Docket for 02-10038

No. 02-10038 Status: ARGUED *** CAPITAL CASE ***
Title: Robert James Tennard, Petitioner
v.
Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed: April 10, 2003
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (00-20915)
Decision Date: January 3, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 3 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 9, 2003)
May 6 2003	Order extending time to file response to petition to and including June 9, 2003.
Jun 5 2003	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Jun 19 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 9 2003	Reply of petitioner Robert James Tennard filed. (Distributed)
Oct 14 2003	Petition GRANTED and it is consolidated with no. 02-11309, Smith v. Dretke, and a total of one hour is allotted for oral argument in these cases. The motion of petitioner for leave to proceed in forma pauperis is granted.
Nov 4 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 15, 2003.
Nov 25 2003	Joint appendix filed.
Dec 10 2003	Brief of petitioner Robert James Tennard filed.
Dec 15 2003	Brief amicus curiae of National Mental Health Association filed. VIDED.
Dec 15 2003	Brief amici curiae of American Association on Mental Retardation, et al. filed. VIDED.
Dec 15 2003	Brief amici curiae of Texas Defender Service and National Assn. of Criminal Defense Lawyers filed. VIDED.
Jan 8 2004	Extension of time within which to file respondent's brief on the merits to and including January 30, 2004.
Jan 12 2004	SET FOR ARGUMENT Monday, March 22, 2004.
Jan 21 2004	CIRCULATED.
Jan 29 2004	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Feb 5 2004	Record received from the U.S.C.A. for the 5th Circuit. (1 envelope)
Feb 9 2004	Record received from the U.S.D.C. for the Southern District of Texas, Houston Division (2 boxes)
Mar 4 2004	Reply of petitioner Robert James Tennard filed. (Distributed)
Mar 22 2004	Argued. For petitioner: Robert C. Owen, Austin, Tex. For respondent: Edward L. Marshall, Assistant Attorney General, Austin, Tex.
Mar 25 2004	Motion to appoint counsel filed by petitioner Robert James Tennard.
Mar 31 2004	Motion DISTRIBUTED for Conference of April 16, 2004.
Apr 19 2004	Motion to appoint counsel filed by petitioner GRANTED. Richard Burr, Esquire, of

Docket for 02-10038

Houston, Texas is appointed to serve as counsel for the petitioner in this case.

02-10038 t/w 02-11309

02-11309

Petition dismissed per rule 46 of the Supreme Court

March 18, 2004

Briefs not filmed

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

No. 02-10038

FILED
APR 8 2003

ROBERT JAMES TENNARD,

Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

APR 8 2003

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to Proceed *in Forma Pauperis*

Petitioner, Robert James Tennard, respectfully requests that the Court permit him to proceed *in forma pauperis* on his Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, to which this motion is attached.

Mr. Tennard is now and has always been eligible to proceed in the federal courts as a pauper. In the most recent proceedings in the United States Court of Appeals for the Fifth Circuit and in the United States District Court for the Southern District of Texas, counsel was appointed for Mr. Tennard in both courts pursuant to 21 U.S.C. § 848(q)(4)(B) (requiring

(10)

appointment of counsel in capital federal habeas corpus proceedings for a person "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services"). In connection with his petition for writ of certiorari, which the Court granted on October 7, 2002, the Court granted his motion to proceed *in forma pauperis*.

WHEREFORE, petitioner respectfully requests that the Court grant leave for him to proceed *in forma pauperis*.

Respectfully submitted.

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Member of the Supreme Court Bar

Attorney for Robert James Tennard

No. 02-10038

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

Supreme Court, U.S.
FILED
APR 3 2003

ROBERT JAMES TENNARD
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY FOR ROBERT JAMES TENNARD

CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Fifth Circuit's rule requiring a "nexus" to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), inconsistent with the rationale of *Atkins v. Virginia*, 122 S.Ct. 2242 (2002)?

2. Did the Fifth Circuit err in resolving the plainly substantial question of the effect of *Atkins* on the Fifth Circuit nexus rule by denying a COA, rather than granting a COA and giving the substantive issue the merits consideration it deserves?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Robert James Tennard respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in his capital federal habeas corpus proceeding.

OPINION BELOW

The Fifth Circuit's opinion is reported as *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003). It is attached hereto as Appendix 1.

JURISDICTION

On October 7, 2002, the Court granted Mr. Tennard's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, vacated the Fifth Circuit's judgment in *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002), and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)."

On January 3, 2003, without requesting briefing from the parties and without prior notice to the parties, the Fifth Circuit announced its opinion on remand. *Tennard v. Cockrell*, 317 F.3d 476. No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Fifth Circuit pursuant to 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

COURSE OF PROCEEDINGS

Robert Tennard was convicted of capital murder and sentenced to death in Harris County, Texas, in October 1985. The Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Thereafter, Mr. Tennard sought habeas corpus relief in the state courts. On December 18, 1997, the CCA denied relief on Mr. Tennard's state habeas application in a 6-3 decision. *Ex parte Tennard*, 960 S.W. 2d 57 (Tex. Cr. App. 1997).

Mr. Tennard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas on December 18, 1998. The district court denied the petition on July 25, 2000. Mr. Tennard filed a timely notice of appeal and requested a certificate of appealability (COA). On March 1, 2002, a panel of the United States Court of Appeals for the Fifth Circuit court denied a COA in a 2-1 decision. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002).[1] Rehearing was denied on April 4, 2002.

A timely petition for writ of certiorari was thereafter filed, and as noted, the Court granted the petition, vacated the judgment of the Fifth Circuit, and remanded for further consideration of Mr. Tennard's case. On remand, the Fifth Circuit reinstated its previous opinion. *Tennard v. Cockrell*, 317 F.3d 476.

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[1]This opinion is attached as Appendix 2.

STATEMENT OF FACTS

A. ***Guilt Phase of Mr. Tennard's Trial***

The guilt phase evidence established that Mr. Tennard and two other men robbed and murdered Larry Neblett and Chester Smith, who were acquaintances of Tennard. Mr. Tennard was convicted of the capital murder of Larry Neblett.

B. ***Penalty Phase of Mr. Tennard's Trial***

Mr. Tennard's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry I*:

> 1. Was the conduct of the defendant that cause the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The State's penalty phase evidence was directed at the special issue on future dangerousness. According to the state's evidence, Mr. Tennard was convicted of rape at age 16 and was in prison from 1979 until he was released on parole in April, 1985. The complainant in the rape case testified that Tennard had been one of three men who sexually assaulted her. SF 29:27-46.[2] She also testified that Tennard allowed her to go to the restroom to take a bath based on her assurance that she would not try to escape. While in the bathroom, she left through a window. On cross-examination, defense counsel brought out a prior statement in which the

[2]References to the trial transcript, in Texas called the "statement of facts," are "SF" followed by the volume and page number of the statement of facts.

complainant indicated that one of the other men who assaulted her, and not Tennard, was the leader. *Ex parte Tennard*, 960 S.W.2d at 58-59.

Tennard's *only* penalty phase witness was William Kinard, his parole officer. SF 29:56. Kinard identified "records of Tennard's IQ level according to the Texas Department of Corrections' records." *Id.* According to those records, Mr. Tennard had an IQ of 67. *Id.* at 58. Mr. Kinard testified that as a matter of course the Texas Department of Corrections administers tests to determine the inmate's I.Q. *Id.* at 58.

Both the prosecution and defense discussed Tennard's I.Q. evidence in closing arguments. The prosecutor preemptively attempted to downplay the evidence: "I'm sure the defense is going to ask you to forgive this man for what he's done. Say that he has a low I.Q. and that you should give him another chance." *Id.* at 72. He urged the jury instead to make its decision "based on the facts," and he argued extensively why the evidence justified affirmative answers to the two special issues. He did not treat the I.Q. evidence as relevant to either special issue.

Defense counsel did indeed argue that Mr. Tennard's impaired intellectual functioning, as evidenced by his low I.Q. and naivete, and his poor upbringing called for a life sentence instead of death. He repeatedly urged the jury to take into consideration Tennard's impaired intellectual functioning. *Id.* at 85, 93-94. He reminded the jury that the evidence was not in dispute:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer. . . . Information that the prison psychiatrist had. . . is that Tennard has got a 67 I.Q.

Id. at 85.

Defense counsel then argued that Tennard's behavior bore the mark of a man with significantly impaired intellect, as confirmed by his low I.Q. score:

> The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, 'Well, if I let you in there, will you leave?' And he believed her. This guy with the 67 I.Q., and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient . . . *that is that low*. [Emphasis added].

Id. Referring to his subnormal I.Q., defense counsel challenged the jury

> to judge [Tennard] as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and *none of you are suffering from a 67 I.Q.*

Id. at 93 (emphasis supplied). He reminded the jury,

> T]he law allows you to take all the things into consideration that I talked to you about -- attitude toward the death penalty, take all these things into consideration, the 67 I.Q. -- in deciding how you answer those questions. You have a right to do that under Texas law.

Id. at 94.

The prosecutor responded that although Tennard's low I.Q. might explain his conduct, the jury must disregard that evidence under the instructions.

> *[T]he reasons why he became a danger are not really relevant*. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

Id. at 98 (emphasis added).

The jury answered both issues affirmatively, and Tennard was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

A. *State Habeas Proceedings*

In state habeas proceedings, Mr. Tennard raised a claim under *Penry v. Lynaugh*, 492

U.S. 302 (1989) *(Penry I)*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide a vehicle for giving effect to his mitigating evidence. Despite uncontradicted evidence that Mr. Tennard had an I.Q. of 67 and behavioral traits consistent with mental retardation, a majority of the Texas court found that there was "no evidence in this record that applicant is mentally retarded," and thus, Tennard was not entitled to a special instruction under *Penry*. *Id.* at 61. In a plurality opinion, Presiding Judge McCormick concluded that even if "applicant's low I.Q. somehow falls within Penry's definition of mental retardation," Mr. Tennard would not have been entitled to a *Penry* instruction because he did not establish that "his low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Ex parte Tennard*, 960 S.W.2d at 62. Without considering the way in which Tennard's low I.Q. evidence was presented and argued by the defense, the Texas court also held the jury was able to give effect to the evidence under the Texas special issues; thus a special instruction under *Penry I* was not required. *Id.* at 62-63. *See also Tennard v. Cockrell*, 284 F.3d at 598 (dissenting opinion).

B. *The Fifth Circuit's Initial Decision in Federal Habeas Proceedings*

In a 2-1 decision denying a COA, the Fifth Circuit accorded a presumption of correctness to the Texas court's finding that there was no evidence in the record that Tennard was mentally retarded, relying heavily on previous Fifth Circuit decisions that "a low I.Q. does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*." *Tennard v. Cockrell*, 284 F.3d at 596. In the alternative, the panel majority held that

Mr. Tennard was not entitled to relief on his *Penry I* claim because he did not demonstrate at trial that his crime was directly attributable to mental retardation. *Id.* at 596-597.

Judge Dennis, dissenting, reasoned that the merits of Mr. Tennard's claim are "squarely governed" by *Penry I*. *Id.* at 597. Judge Dennis concluded that "Tennard is entitled to relief under 28 U.S.C. § 2254(d)(1) because the decision of the Texas Court of Criminal Appeals rejecting his *Penry I* claim is based on rationales that were rejected generally and specifically by *Penry I*." *Id.* at 601.

With respect to the panel majority's alternative holding, Judge Dennis argued that the circuit's "nexus" decisions are based upon dicta explaining the historical, moral, and social principles underlying *Lockett v. Ohio* 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and not the holding in *Penry I*, and thus cannot serve as precedent under 28 U.S.C. § 2254(d)(1). In support of this principle, Judge Dennis relied on the analysis in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), that § 2254(d)(1) "'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision.'" *Tennard*, 284 F.3d at 604, quoting *Williams*.

C. *The Fifth Circuit's Decision on Remand*

In his previous petition for writ of certiorari to the Fifth Circuit, Mr. Tennard argued that he was in the same position as Johnny Penry after Penry's first trial and that he was entitled to relief under *Penry I*. Tennard also attacked the Fifth Circuit's use of its "nexus" rule to deny relief, arguing that the then-recent decision in *Atkins v. Virginia* established as a matter of law that mental retardation, or the kind of impaired intellectual functioning and judgment that Tennard exhibited – which was consistent with mental retardation, was mitigating and thus made

the use of the nexus rule in a case like his inappropriate. In keeping with this argument, the Court granted Mr. Tennard's petition, vacated the Fifth Circuit judgment, and remanded for further consideration of Tennard's case in light of *Atkins*.

On remand, the Fifth Circuit never set a briefing schedule. Without prior notice, on January 3, 2003, the court issued a short opinion setting forth the following:

> In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the application of the death penalty to mentally retarded persons. Tennard has never argued that the Eighth Amendment prohibits his execution. Instead, Tennard argued that the jury instructions did not provide a vehicle for giving mitigating effect to his evidence of mental retardation in violation of the Eighth Amendment. Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us.

Tennard v. Cockrell, 317 F.3d 476. For this reason, the Fifth Circuit reinstated its panel and affirmed the district court judgment. Judge Dennis joined the panel's remand opinion but reasserted his dissent from the original panel opinion. *Id.*

REASONS FOR GRANTING CERTIORARI

I. THE FIFTH CIRCUIT FAILED TO UNDERTAKE THE FURTHER REVIEW THAT THIS COURT DIRECTED IN ITS ORDER OF OCTOBER 7, 2002.

The Fifth Circuit failed to do what the Court directed on the remand in Mr. Tennard's case. It did not consider the effect of *Atkins v. Virginia* on its resolution of the *Penry* issue presented by Mr. Tennard. Apparently assuming that this Court was misled into thinking that Tennard had presented a claim that he should not be executed because he was mentally retarded – an "*Atkins* claim" – the Fifth Circuit gave no further consideration to Mr. Tennard's *Penry* claim in light of *Atkins*. This Court should undertake that consideration, or remand again to the Fifth Circuit with an explicit direction that it consider Mr. Tennard's *Penry* claim further in light of

Atkins.

Mr. Tennard's argument is just as compelling today as it was when the Court ordered further consideration on October 7, 2002.

The Fifth Circuit's "nexus" rule precluded relief for Mr. Tennard because "he made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d at 596. Thus, in the view of the Fifth Circuit a capital defendant's evidence of mental retardation or low IQ and associated behavioral deficits does not qualify as constitutionally relevant mitigating evidence unless the defendant can demonstrate that the capital crime is in fact the product of such intellectual impairments. *See Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir. 1996); *Davis Scott*, 51 F.3d 457 (5th Cir. 1995).

This rule does not find support in any decision of the Court. Moreover, it is in direct conflict with the rationale underlying the holding in *Atkins v. Virginia*.

The Fifth Circuit's "nexus rule" is a circuit-crafted rule that evolved from Justice O'Connor's observations for the Court in *Penry I* regarding the historical underpinning of the *Lockett* and *Eddings* rule.[3] As the dissenting opinion of Judge Dennis points out, however, the

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[3]The Court observed in *Penry I*.

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis supplied).

passage is clearly dicta and not a part of the holding in *Penry*. *Tennard*, 284 F.3d at 604. As such, it is not a proper basis for determining the merits of a *Penry* claim.

The Fifth Circuit first required a causal connection between proffered mitigating evidence and a capital defendant's crime in *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992). In *Graham* and the cases that followed, the court continued to require a "nexus," but it recognized that evidence of mental retardation tended to establish a nexus in and of itself. As the court explained, "*Penry* type disability evidence ... can reduce culpability where it is *inferred* that the crime is attributable to the disability . . . [while] good character evidence provides no variety of 'excuse.'" *Id.* at 1033. (Emphasis added). This approach was followed for a short time thereafter.[4]

In *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994), however, the court imposed a more stringent "nexus" requirement when determining whether proffered evidence about a capital defendant's character and background qualifies as constitutionally relevant mitigating evidence. Under the *Madden* rule, character and background evidence does not qualify as constitutionally relevant mitigating evidence *unless* the defendant can affirmatively demonstrate that the factors underlying the proffered evidence "[are] directly responsible for the instant crime." *Id.* at 307.[5]

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[4]*See Russell v. Collins*, 998 F.2d 1287, 1292 (5th Cir. 1993) ("While 'attribution' does not require a precise nexus between such background evidence and the crime, at a minimum the evidence must permit a rational jury to 'infer that the crime is attributable,' at least in part, to the defendant's background"); *Motley v. Collins (Motley I)*, 3 F.3d 781, 791 (5th Cir. 1993). ("If a jury could reasonably infer, based on the evidence at trial, that the crime is in some way attributable to disadvantaged background, no more specific nexus is required under our precedent").

[5]Applying this new rule to Madden's evidence of personality disorder, long term drug abuse, diminished mental capacity, learning disability, and troubled childhood, the court held that because Madden had not demonstrated that any of these conditions and or circumstances

The only authority cited for the *Madden* rule is Justice O'Connor's historical observations in *Penry I*. *Id.*

In developing and applying this "nexus" requirement, the Fifth Circuit ignored years of this Court's precedent which holds that a capital sentencer "may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Never has the Court limited the consideration of mitigating circumstance to factors that produced the crime.[6]

The reason for this is obvious. A rational jury may infer that child abuse, severe deprivation, and mental retardation – or as here, an extremely low IQ coupled with behavioral deficits that are associated with low intellectual functioning – lessen a defendant's personal or moral culpability for a violent crime. The crime may not have been directly "attributable" to such factors, but the person who has endured these experiences or suffered such impairments is considered less blameworthy for criminal behavior. As Chief Justice Rehnquist observed in a different context with respect to child abuse, "It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J. dissenting).

The decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), makes this point explicit for capital defendants who suffer from mental retardation. The basis for the decision that the Eighth Amendment no longer sanctions the death penalty for mentally retarded offenders was that "today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 2249, and that while "[mentally retarded capital offender's] deficiencies do not warrant an exemption from criminal sanctions, ... they do diminish their personal culpability." *Id.* at 2250-2251. Accordingly, the Court recognized that certain factors in and of themselves reduce a capital offender's moral culpability even if there is no evidence that such factors directly contributed to the commission of the crime.

When applied to evidence of mental retardation, the Fifth Circuit's nexus rule thus perpetuates, rather than remedies, *Penry* violations. The facts of Mr. Tennard's case illustrate this vividly. The prosecutor acknowledged in his argument to Tennard's jury that Tennard's low IQ might be "a reason why he became a danger" but then argued that such reasons "are not really relevant." Thus, he argued,

[W]hether [Tennard] has a low I.Q. or not is not really the issue. Because the

were the direct cause of his crime, his evidence did not qualify as constitutionally mitigating evidence. Thus, it did not matter whether or not the evidence could be considered within the scope of the special issues. *Id.* at 308.

[6] *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) ("the fundamental respect for humanity underlying the Eighth Amendment [] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime"); *Penry I*, 492 U.S. at 327-28 ("[I]t is precisely because the punishment should be directly related to the personal moral culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"); *Walton v. Arizona*, 497 U.S. 639, 663 (1990) (Scalia, J. dissenting) ("[w]hatever evidence bearing on the crime or the criminal the defendant wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer.") The Court has not suggested in any of these cases that constitutionally relevant mitigating evidence is limited to evidence that has a direct causal connection to the crime.

> legislature, in asking you to address that question, [said that] *the reasons why he became a danger are not really relevant*. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

SF 29:98 (emphasis added).

This argument gave emphasis to what the jury already could well have ascertained on its own. The evidence of Tennard's low intellectual functioning could well have been considered as a reason for finding that Tennard posed a risk of future danger, because his impaired functioning led him to commit crimes. Thus, this evidence could have been considered in relation to future dangerousness – but only in support of it, as the Court recognized in *Penry I*. The Fifth Circuit's nexus rule, which approves the exclusion of impaired intellectual functioning from consideration as mitigation unless that impairment produces the crime, thus has the effect of exacerbating the *Penry* violation. The jury is allowed to give the evidence aggravating effect in considering future dangerousness but is unable to give it mitigating effect unless it produced the crime. This result simply cannot be reconciled with *Atkins*' recognition that mental retardation is inherently mitigating.

Accordingly, when the evidence establishes in a pre-*Penry* Texas capital trial that the defendant suffers from a 67 IQ and from at least some of the impairments associated with mental retardation, that evidence must be considered as mitigating under the Eighth Amendment. Even if there were a requirement that mitigating factors somehow contributed to the capital crime for such factors to be considered constitutionally mitigating, *Atkins* has established unequivocally that the kind of impairments suffered by Mr. Tennard are, as a matter of law, mitigating. People with such impairments are "categorically less culpable than the average criminal."

For these reasons, the Fifth Circuit's nexus rule cannot stand in the way of relief for Mr.

Tennard under *Penry I*.

II. REINSTATING ITS PREVIOUS OPINION, RATHER THAN RECONSIDERING TENNARD'S *PENRY* ISSUE ON REMAND, THE FIFTH CIRCUIT VIOLATED THE RULE OF *MILLER-EL V. COCKRELL*, 123 S.CT. 1029 (2003).

In *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), the Court considered a capital habeas decision, also from the Fifth Circuit, in which the Fifth Circuit denied a certificate of appealability (COA) under 28 U.S.C. § 2253(c) by considering and deciding the merits of the claim presented rather than whether that claim satisfied the standard for granting a COA. The Court "reiterate[d] that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2)." 123 S.Ct. at 1034, and explained.

> A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Id. (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court then held that when a court denies a COA by deciding the merits against the petitioner it does so in violation of 28 U.S.C. § 2253(c) and, in effect, without jurisdiction:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. . . . This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.

Id. at 1039.

In its initial opinion in Mr. Tennard's case, the Fifth Circuit did exactly what it did in Mr. Miller-El's case. It set out the inquiry as whether Tennard's request for a COA should be granted, 284 F.3d at 594, then recited the proper standard for making this determination – "a petitioner 'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)) (emphasis in original). The court then conducted a full consideration of the merits of the *Penry* issue presented by Tennard. *Id.* at 595-597. After concluding that Tennard's claim failed on the merits, the court then held "that Tennard has not made a substantial showing of the denial of a constitutional right." *Id.* at 597.

On remand from this Court, the Fifth Circuit could have undertaken a proper COA inquiry, but it did not. All it did, after failing to consider the *Penry* issue further in light of *Atkins*, was "reinstate our panel opinion and AFFIRM the district court's judgment." 317 F.3d 476. Since the original panel opinion suffered from the same defect as the panel opinion in *Miller-El*, the Fifth Circuit's judgment must again be vacated – in light not only of *Atkins* but also, *Miller-El*.

CONCLUSION

For these reasons, the Court should grant certiorari to correct the Fifth Circuit's violation of 28 U.S.C. § 2253(c) and its misapplication of the Eighth Amendment's safeguards.

Respectfully submitted,

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317 F.3d 476
(Cite as: 317 F.3d 476)

United States Court of Appeals.
Fifth Circuit.

Robert James TENNARD, Petitioner-Appellant,
v.
Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 00-20915.

Jan. 3, 2003.

Mandy Welch, Burr & Welch, Houston, TX, for Petitioner-Appellant.

*477 Charles A. Palmer, Asst. Atty. Gen., Austin, TX, for Respondent- Appellee.

Appeal from the United States District Court for the Southern District of Texas; Lynn N. Hughes, Judge.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

The Supreme Court of the United States, by order in *Tennard v. Cockrell*, --- U.S. ----, 122 S.Ct. 70, 151 L.Ed.2d 4 (2002), granted appellant's petition for a writ of *certiorari*, vacated the judgment, [FN1] and remanded it to us for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which was decided after the issuance of our opinion in this case. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the application of the death penalty to mentally retarded persons. Tennard has never argued that the Eighth Amendment prohibits his execution. Instead, Tennard argued that the jury instructions did not provide a vehicle for giving mitigating effect to his evidence of mental retardation in violation of the Eighth Amendment. Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us. *Cf. Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir.2002) (declining to address *Atkins* claim raised for the first time on appeal); *Soffar v. Dretke*, 311 F.3d 915, 923 (8th Cir.2002) (declining to address *Atkins* claim because petitioner did not raise an Eighth Amendment claim in his federal habeas petition).

FN1. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002).

Accordingly, we reinstate our panel opinion and AFFIRM the district court's judgment.

DENNIS, Circuit Judge, dissenting:

Although I agree with the panel majority that Tennard's claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), is not properly before this court because petitioner did not raise this claim in his district court habeas petition, I continue to dissent from the now restored panel opinion, *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002), for the reasons given in my dissent there.

317 F.3d 476

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284 F.3d 591
(Cite as: 284 F.3d 591)

United States Court of Appeals.
Fifth Circuit.

Robert James TENNARD, Petitioner-Appellant,
v.
Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 00-20915.

March 1, 2002.

Following affirmance of murder conviction and death sentence, 802 S.W.2d 678, state prisoner petitioned for habeas corpus. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., denied the petition, and petitioner requested a certificate of appealability (COA). The Court of Appeals, Benavides, Circuit Judge, held that: (1) petitioner failed to rebut the presumption of correctness afforded the state court's finding that there was "no evidence" of his mental retardation, though there was evidence that he had an I.Q. of 67, and (2) even assuming that petitioner rebutted that finding, his claim of *Penry* error, to the effect that the special issues submitted at the punishment phase did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation, failed where he made no showing at trial that the criminal act was attributable to this severe permanent condition.

Request denied.

Dennis, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Habeas Corpus 818
197k818 Most Cited Cases

To make a substantial showing of the denial of a constitutional right, as required to obtain a certificate of appealability (COA), a habeas petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. 28 U.S.C.A. § 2253(c)(2).

[2] Habeas Corpus 818
197k818 Most Cited Cases

Any doubt regarding whether to grant a certificate of appealability (COA) is resolved in favor of the habeas petitioner, and the severity of the penalty may be considered in making this determination. 28 U.S.C.A. § 2253(c)(2).

[3] Habeas Corpus 818
197k818 Most Cited Cases

To determine whether a certificate of appealability (COA) should be granted for a habeas appeal, court must be mindful of the deferential scheme set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. §§ 2253(c)(2), 2254(d).

[4] Habeas Corpus 452
197k452 Most Cited Cases

A state court's decision is deemed contrary to clearly established federal law, so as to warrant a grant of habeas corpus, if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 450.1
197k450.1 Most Cited Cases

A state court's decision constitutes an unreasonable application of clearly established federal law, so as to warrant a grant of habeas corpus, if it is objectively unreasonable. 28 U.S.C.A. § 2254(d).

[6] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases

In reviewing a *Penry* claim of absence of instructions in a capital murder case informing jury that it could consider and give effect to mitigating evidence of defendant's mental retardation, court must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury, and to be constitutionally relevant, the evidence must show: (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition.

[7] Habeas Corpus 770
197k770 Most Cited Cases

Habeas petitioner, arguing *Penry* error in that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation, failed to rebut the presumption of correctness afforded the state court's finding that there was "no evidence" of his mental retardation, though there was evidence that he had an I.Q. of 67, where there was no evidence introduced with respect to the meaning of the score and defendant did not argue to the jury that he was mentally retarded. 28 U.S.C.A. § 2253(c)(2).

[8] Habeas Corpus 508
197k508 Most Cited Cases

Even assuming that habeas petitioner rebutted with clear and convincing evidence the state court's finding of no evidence of mental retardation, his claim of *Penry* error, to the effect that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to petitioner's evidence of mental retardation, failed where he made no showing at trial that the criminal act was attributable to this severe permanent condition.

[9] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases

It is not simply the fact that one is labeled mentally retarded that establishes a *Penry* claim of error to the effect that the special issues submitted at the punishment phase of capital murder trial did not provide the jury with a vehicle for giving mitigating effect to petitioner's evidence of mental retardation; defendant must show there is a nexus between the alleged mental retardation and the capital murder.

*592 Mandy Welch (argued), Burr & Welch, Houston, TX, for Petitioner- Appellant.

Charles A. Palmer, Asst. Atty. Gen. (argued), Austin, TX, for Respondent- Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

Petitioner Robert James Tennard (Tennard), convicted of capital murder in Texas and sentenced to death, requests from this Court a Certificate of Appealability (COA) pursuant to 28 U.S.C. § 2253(c)(2). Tennard's sole argument is that the jury was unable to give effect to the mitigating evidence of his mental retardation when answering the special issue with respect to future dangerousness at the punishment phase. Finding that Tennard has not made a substantial showing of the denial of a constitutional right, we DENY the COA.

I. FACTUAL AND PROCEDURAL HISTORY

On October 17, 1985, Tennard was indicted for the capital murder of Larry Neblett (Neblett) committed during the course of a robbery. The following evidence *593 introduced at trial established that Tennard and two others murdered two men during a robbery. [FN1]

FN1. The facts are taken directly from the opinion of the Texas Court of Criminal Appeals. *Ex parte Tennard*, 960 S.W.2d 57, 58-59 (Tex.Crim.App.1997).

Tennard lived behind the home of the two victims, and he knew them. The victims had invited Tennard and his two friends into their home approximately fifteen to thirty minutes before they were attacked. Tennard stabbed one of the victims fifteen times with a knife while one of Tennard's friends killed the other victim with a hatchet. Tennard played a dominant role in disposing of the victims' stolen property. Tennard presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders. Based on the above evidence, the jury found him guilty of capital murder.

The evidence from the punishment hearing shows Tennard had been on parole from a felony rape conviction for less than four months when he committed the instant offense. The rape victim testified Tennard and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, Tennard, who was displaying about a foot-and-a-half-long pipe wrench, threatened to kill her if she moved.

The victim testified Tennard and his friends took her to an abandoned apartment at a government project where Tennard forced her to engage in oral, vaginal and anal sex with him. After that, Tennard's two friends took turns sexually assaulting her.

Tennard and his friends then took the victim to another house where he began using drugs and discussing "pimping out" the victim. She asked Tennard if she could go to the restroom to take a bath, which he allowed her to do. She escaped through a window, and Tennard was arrested later that day. The victim testified Tennard appeared to be the leader during her ordeal. Defense counsel impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of Tennard's accomplices was the leader.

Tennard's parole officer testified that a Texas Department of Correction's (TDC) record from his prior incarceration indicated he had an intelligence quotient (I.Q.) of 67. During cross-examination of this witness, the State introduced the TDC record into evidence. This document appears to have been prepared approximately five years before Tennard committed the capital murder offense, and there is a notation providing Tennard had an I.Q. of 67. However, the parole officer could not say who prepared the report or conducted the I.Q. test. This is all the evidence presented at Tennard's trial with respect to his "mental retardation." [FN2] The term "mental retardation" is not mentioned anywhere in this record.

FN2. During cross-examination, Tennard's parole officer testified as follows:
Q. [T]his doesn't purport to be any report by any particular psychologist or anything, does it?
A. No, sir.
Q. It's basically just sort of, as its says, social and criminal history of [Tennard]?
A. Right, sir.
Q. And it says, there's basically a line for IQ, and it says 67?
A. That's correct. Q. And it has no indication of who may have given those tests or under what conditions?
A. No sir, it doesn't.

Tennard also introduced evidence that he was twenty-two years of age when he *594 committed this offense and that he had spent most of his formative years incarcerated.

At the conclusion of the punishment phase, the jury affirmatively answered the special issues. Pursuant to Texas law, the trial court sentenced him to death. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex.Crim.App.1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1077 (1991). Tennard filed an application for state habeas relief that ultimately was denied by the Texas Court of Criminal Appeals. *Ex parte Tennard*, 960 S.W.2d 57 (Tex.Crim.App.1997).

Subsequently, Tennard filed the instant federal habeas petition in district court. The district court denied Tennard's petition and his request for a COA. Tennard now requests a COA from this Court.

II. ANALYSIS

A. STANDARDS OF REVIEW

[1][2] Tennard filed his section 2254 application for habeas relief on December 18, 1998, which was after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). His application is therefore subject to the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997). Under the AEDPA, a petitioner must obtain a COA. 28 U.S.C. § 2253(c)(2). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983) (citation and internal quotation marks omitted). Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir.1997).

[3][4][5] To determine whether a COA should be granted, we must be mindful of the deferential scheme set forth in the AEDPA. *Hill v. Johnson*, 210 F.3d 481, 484-85 (5th Cir.2000). Pursuant to 28 U.S.C. § 2254(d), we defer to a state court's adjudication of petitioner's claims on the merits unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000). A state court's decision constitutes an unreasonable application of clearly established federal law if it is objectively

unreasonable. *Id* at 1521.

Further, state court findings of fact are presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. Section 2254(e)(1).

B. JURY INSTRUCTIONS

*595 Relying on *Penry v. Lynaugh*, [FN3] Tennard argues that the special issues submitted at the punishment phase did not provide the jury with a vehicle for giving mitigating effect to his evidence of mental retardation. Specifically, Tennard contends that a juror answering the two special issues affirmatively but nevertheless believing a life sentence appropriate (based on the evidence of his mental retardation) had no vehicle to express this belief.

FN3. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[6] In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury. *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir.1995). To be constitutionally relevant, "the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition." *Id.* at 460-61 (internal quotation marks and citation omitted).

As previously set forth, during the punishment phase, Tennard called his parole officer, William Kinard (Kinard), as a witness. Kinard testified that an I.Q. test was administered to inmates at TDC as a matter of course. Kinard also testified that a document from TDC provided Tennard's I.Q. was 67. Kinard was the only defense witness who testified before the jury during the punishment phase.[FN4]

FN4. The record shows that the trial court did not allow defense counsel to call a witness who would have testified that one of Tennard's accomplices received a life sentence for the instant offense.

During defense counsel's closing argument, he referred to Tennard's "low" I.Q. several times:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that Tennard has got a 67 IQ. The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got *an intelligence quotient ... that is that low.*
>
> • • •
>
> Now you're charged with acting as Robert Tennard's peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers. And I would ask you as you do that, as is your responsibility, you take into consideration the things that you have been informed of by me and by things the prosecutor has told you in judging Robert Tennard....
>
> • • •
>
> And don't let [the prosecutor] get up here and tell you to put blinders on and *596 just answer the questions in a vacuum. The law allows you to take all the things into consideration that I talked to you about--attitude toward the death penalty, take all these things into consideration, the 67 IQ--in deciding how you answer the those questions. You have a right to do that under Texas law. Don't let [the prosecutor] tell you you can't just look at the evidence and just answer the questions. You are allowed more latitude than that. Remember, what you do here will be forever lasting one way or the other.

(emphasis added)

As the record reveals, although defense counsel presented evidence of Tennard's low I.Q., he did not argue that Tennard was mentally retarded. The Court of Criminal Appeals recognized that the term "mental retardation" was never mentioned in the trial record. *Ex parte Tennard*, 960 S.W.2d at 59. Indeed, a majority of the Court of Criminal Appeals found "no evidence in this record that [Tennard] is mentally retarded." *Id.* at 61.[FN5] Under the AEDPA, we are required to afford a presumption of correctness to this factual finding, 28 U.S.C. § 2254(e)(1). *see Davis*, 51 F.3d at 461 n. 4 (affording a presumption of correctness to state court's finding of no evidence that petitioner was mentally retarded).

FN5. Additionally, in a concurring opinion, Judges Meyers and Price concluded that there was not enough evidence of mental retardation in the record to support Tennard's claim. 960 S.W.2d at 67 n. 9. Judge Baird dissented, opining that Tennard's I.Q. of 67 was "presumptive of his mental retardation." *Id.* at 71.

This Court has explained that evidence of a low I.Q. does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*. *Andrews v. Collins*, 21 F.3d 612, 629-30 (5th Cir.1994); *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir.1994).

Nevertheless, Tennard contends that an individual with an I.Q. of 67 has significantly below normal functioning and is presumptively mentally retarded. Thus, he argues, such an individual is less able than a normal adult to control his conduct, evaluate the consequences of his conduct, and learn from his mistakes. To support this proposition, Tennard points out that the American Association of Mental Retardation (AAMR) classified individuals with an I.Q. score of 75 and below as presumptively retarded. *See* AAMR Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed.1992).

[7] The flaw in Tennard's argument is that he did not establish or argue to the jury that he was mentally retarded. A prison document provided that Tennard had an I.Q. score of 67. There was no evidence introduced with respect to the meaning of the score, nor its relation to Tennard's moral culpability. As stated, the term "mental retardation" was never articulated before the jury. This dearth of evidence is in stark contrast to the "substantial mitigating evidence that Penry was mentally retarded." *Penry v. Johnson*, 261 F.3d 541 (5th Cir.2001). Under these circumstances, we are constrained to hold that Tennard has not rebutted the presumption of correctness afforded the state court's finding that there was "no evidence" of Tennard's mental retardation.

[8] Even assuming *arguendo* for purposes of this appeal that Tennard has rebutted with clear and convincing evidence the state court's finding of no evidence of mental retardation, his claim must fail because he made no showing at trial that the criminal act was attributable to this severe permanent condition.

*597 [9] We have recognized it is not simply the fact that one is labeled mentally retarded that establishes a *Penry* claim. *See Robison v. Johnson*, 151 F.3d 256, 264 (5th Cir.1998) (citing *Robison v. Texas*, 888 S.W.2d 473 (Tex.Crim.App.1994)).[FN6] A petitioner must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder. As in Tennard's case, in *Boyd v. Johnson*, the only evidence of mental retardation introduced at trial was the petitioner's I.Q. score of 67 contained in his prison packet. 167 F.3d 907, 912 (5th Cir.1999). We stated that even assuming that the I.Q. score of 67 demonstrates a "'uniquely severe permanent handicap,' it does not establish 'that the criminal act was attributable to this severe permanent condition.'" *Id.* (quoting *Davis*, 51 F.3d at 461). Moreover, we expressly have rejected the notion that "a nexus is inherent between any evidence of mental retardation and a crime." *Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir.1996).

FN6. *See also Davis*, 51 F.3d at 460 (explaining that "evidence of a disadvantaged background, or emotional and mental problems, does not raise, *ipso facto*, a *Penry* claim").

Tennard is precluded from establishing a *Penry* claim because he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his I.Q. of 67. *See Cranky Collins*, 19 F.3d 172, 175-76 (5th Cir.1994) (stating that it is well established capital defendants cannot base a *Penry* claim upon evidence that could have been, but was not, proffered at trial).

For the above reasons, we conclude that Tennard has not made a substantial showing of the denial of a constitutional right and DENY his request for a COA.

DENIED.

DENNIS, Circuit Judge, Dissenting:

I respectfully dissent.

The threshold question under AEDPA is whether Tennard seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. *Williams v. Taylor*, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). That

question is easily answered because the merits of his claim are squarely governed by *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)(*Penry I*). [FN1] Because *Penry I* qualifies as "clearly established Federal law, as determined by the Supreme Court," that precedent "dictated" that the Texas Court of Criminal Appeals apply that decision in entertaining Tennard's *Penry* claim. *See Williams*, 529 U.S. at 390, 120 S.Ct. 1495 (citing *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1984)).

FN1. Tennard's direct state appeal was decided November 28, 1990, and his motion for rehearing was overruled January 30, 1991. *Tennard v. State*, 802 S.W.2d 678 (Tex.Crim.App.1991).

Tennard is entitled to relief because the Texas Court of Criminal Appeals's adjudication rejecting his *Penry I* claim resulted in a decision that was (1) "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," and (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2) (West Supp.2001).

At the penalty phase of the trial, Tennard introduced evidence "on his 'mental retardation.' " *Ex parte Tennard*, 960 S.W.2d 57, 59 (Tex.Crim.App.1997) (en banc). The evidence of Tennard's mental retardation consisted of evidence that he had an I.Q. of 67, that he was a "follower" *598 of others, and that he was easily duped. [FN2] *Id.* at 58-59. Nevertheless, the state court of criminal appeals rejected Tennard's *Penry I* claim on two grounds. First, that court found that there was "no evidence in the record that applicant is mentally retarded." *Id.* at 61. Second, even assuming that the evidence of Tennard's I.Q. of 67 and other evidence was evidence of mental retardation, the court of criminal appeals rejected his *Penry I* claim because (1) there was no evidence Tennard's low I.Q. rendered him unable to appreciate the wrongfulness of his conduct or to learn from his mistakes or diminished his ability to control his impulses or evaluate the consequences of his conduct; (2) therefore, there was no danger that the jury would have given any mitigating qualities of the evidence of Tennard's low I.Q. only aggravating effect in answering special issue two (whether there was a probability that he would be a continuing threat to society); and (3) the special issues did not place mitigating qualities of the evidence of applicant's low I.Q. beyond the effective reach of the jury: "[t]he jury could have used this evidence for a 'no' answer to the first special issue on 'deliberateness,' " and "the jury could have used the low I.Q. evidence to conclude [that Tennard] was a 'follower' instead of a 'leader.' " *Id.* at 62-63. Thus, "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low I.Q. evidence." *Id.*

FN2. In a previous offense, Tennard was easily fooled into allowing a victim to go to the restroom and escape because he believed her promise not to run away. *Ex parte Tennard*, 960 S.W.2d at 58-59.

I.

The finding of fact of the Texas Court of Criminal Appeals that there was no evidence in the record that Tennard is mentally retarded was patently an "unreasonable [factual] determination." " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 401. The evidence in the record of Tennard's child-like credulity and I.Q. of 67 had a tendency to make the existence of his mental retardation more probable that it would be without that evidence. [FN3] In a capital murder case the fact that mental retardation is part of the defendant's character and background is relevant mitigating evidence that the jury must be allowed to consider and to give effect to in deciding whether to inflict the death penalty. *Penry I*, 492 U.S. at 316-22, 327-28, 109 S.Ct. 2934 (citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)). Therefore, the defendant's mental retardation is a fact of consequence to the determination of the death penalty action and any evidence that makes its existence more probable is relevant mitigating evidence of that mental condition. Because there plainly is evidence in the record of mental retardation in Tennard's character and background, the court of criminal appeals's unreasonable finding to the contrary in adjudication of Tennard's claim "resulted in a decision that was based on *599 an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Consequently, under § 2254(d)(2), Tennard's application for a COA to pursue a writ of habeas corpus should be granted.

FN3. Findings of fact by panels of this court in other cases are not binding upon this panel

under the doctrine of stare decisis. *See, e.g.*, 18 James Wm. Moore et al., *Moore's Federal Practice* § 134.05[3] (3d ed. 1999) ("The doctrine of stare decisis does not apply to the determination of the facts of a case.").

2.

In *Penry I*, the Supreme Court held that (1) "at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty[.]" 492 U.S. at 318, 109 S.Ct. 2934; (2) "[t]he rule Penry [sought]--that when such mitigating evidence [of his mental retardation and abused childhood] is presented, Texas juries must ... be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed--is not a 'new rule' under *Teague* because it is dictated by *Eddings* and *Lockett*[.]" *Id.* at 318-19, 109 S.Ct. 2934; (3) "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer[-][t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence[.]" *Id.*; (4) "[i]n order to ensure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime[.]" *Id.* at 328, 109 S.Ct. 2934; and (5) therefore, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused [childhood] background by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision." *Id.* at 328, 109 S.Ct. 2934 (internal quotations and citations omitted).

Thus, the Supreme Court in *Penry I* agreed with Penry's argument "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its reasoned moral response to that evidence in determining whether death was the appropriate punishment." *Id.* at 322, 109 S.Ct. 2934. The Court explained in detail why it rejected the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the three special issues. *Id.*

The first special issue, which asked whether the defendant acted "deliberately and with the reasonable expectation that the death of the deceased ... would result," impermissibly limited the jury's function because the term "deliberately" had not been defined by the Texas Legislature, the Texas Court of Criminal Appeals, or the trial court's instructions. *Id.* at 322, 109 S.Ct. 2934. Assuming that the jurors "understood 'deliberately' to mean something more than ... 'intentionally' committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue." *Id.* The Court concluded that the jury could not give full effect to Penry's evidence under the first special issue because "deliberately" was not defined "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." *Id.* at 323, 109 S.Ct. 2934. Thus, Penry's "mitigating evidence of mental *600 retardation and childhood abuse ha[d] relevance to his moral culpability beyond the scope of the special issues...." *Id.* at 322, 109 S.Ct. 2934. Consequently, the Court concluded, unless there are "jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.* at 323, 109 S.Ct. 2934. "Thus, we cannot be sure that the jury's answer to the first special issue reflected a reasoned moral response to Penry's mitigating evidence." *Id.* (internal quotation omitted).

The second special issue, which asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," permitted the jury to consider and give effect to Penry's mental retardation and childhood abuse as "relevant only as an aggravating factor...." *Id.* But the second special issue was not inadequate simply because it only gave effect to Penry's evidence as an aggravating factor: it was dysfunctional for the independent reason that it did not allow the jury to give "full consideration [to the] evidence that mitigates against the death penalty." *Id.* at 328, 109 S.Ct. 2934. "The second special issue, therefore, did not provide a vehicle for the jury to give mitigative effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324, 109 S.Ct. 2934.

As the justices who dissented in part in *Penry* acknowledged, the *Penry* majority held "that the constitutionality [of a death sentence under the Texas special issues] turns on whether the questions allow mitigating factors not only to be considered (and, of course, given effect in answering the questions), but

also to be given effect in all possible ways, including ways that the questions do not permit." *Id.* at 355, 109 S.Ct. 2934 (Scalia, J., dissenting in part and concurring in part). Or, as the majority concluded, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, ... the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentence." *Id.* at 328, 109 S.Ct. 2934.

The Court in *Penry I* expressly rejected the State's argument that any defect in the jury instructions should be disregarded because Penry's defense counsel was able to argue that jurors who believed that Penry, because of his mitigating evidence of mental retardation and childhood abuse, did not deserve a death sentence should vote "no" on one of the special issues regardless of the State's proof on that the answer. *Id.* at 325, 109 S.Ct. 2934. The Court pointed out that "the prosecution countered by stressing that the jurors had taken an oath to follow the law, and that they must follow the instruction they were given in answering the special issues." *Id.* "In light of the prosecutor's argument, and in the absence of appropriate jury instructions," the Court concluded, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326, 109 S.Ct. 2934.

Further, the Court reaffirmed and quoted its opinion in *McCleskey v. Kemp*: " 'In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant *601 evidence that might cause it to decline to impose the death sentence.' " *Id.* at 327, 109 S.Ct. 2934 (quoting 481 U.S. 279, 304, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)). Consequently, the Court concluded:

> Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense.... In order to ensure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.

Id. at 327-28, 109 S.Ct. 2934 (internal citations and quotations omitted).

Tennard is entitled to relief under 28 U.S.C. § 2254(d)(1) because the decision of the Texas Court of Criminal Appeals rejecting his *Penry I* claim is based on rationales that were rejected generally and specifically by *Penry I*. In general, the Supreme Court in *Penry I* agreed with Penry's argument "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment [and] reject[ed] the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934. The decision of the Texas Court of Criminal Appeals contradicted that basic *Penry I* holding by deciding that the special issues allowed the jury to consider and give effect to Tennard's mitigating evidence of mental retardation.

Moreover, the decision of the Texas Court of Criminal Appeals was contrary to *Penry I* in at least three specific ways. First, in contradiction of *Penry I*, the Texas Court of Criminal Appeals held that, in order have his mitigating evidence of mental retardation considered and given effect by the jury, Tennard must introduce additional evidence that his low I.Q. rendered him unable to appreciate the wrongfulness of his conduct or to learn from his mistakes or diminished his ability to control his impulses or evaluate the consequences of his conduct. The state-court's reading of that additional requirement into *Penry I* is based on a misinterpretation of dicta [FN4] in *Penry I* and is contrary to *Penry I*'s holding. [FN5] As *Penry I* repeatedly made *602 clear, when a state's capital punishment scheme assigns a jury the role of sentencer, any and all mitigating evidence, including evidence of the defendant's mental retardation, must be presented to the jury. *Id.* at 328, 109 S.Ct. 2934, and it is exclusively the prerogative of the jury to consider, weigh, and decide what effect should be given to that evidence in its determination of whether to inflict the death penalty. *See id.* at 323, 328, 109 S.Ct. 2934.

FN4. The statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495. *See also infra* note * and accompanying text.

FN5. In *Penry I* the Court observed in passing that "[i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.' " *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). This is merely a statement of the underlying moral and social principles requiring that a potential death sentencer must consider and give effect to evidence of the defendant's mitigating evidence. This passage cannot be read with any intellectual honesty as being part of or essential to the *Penry I* holding or a finding or judicial notice of an adjudicative fact in *Penry I*. *See* Fed.R.Evid. 201.

Second, the Texas Court of Criminal Appeals also held, contrary to *Penry I*, that the Supreme Court's decision does not apply under special issue two in the absence of evidence tending to cause the jury to give *only* aggravating effect to the evidence of defendant's low I.Q., *Tennard*, 960 S.W.2d at 62; and that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low IQ evidence," such as the evidence in the present case and in defendant's prior felony rape conviction that he was a "follower" instead of a "leader" in the commission of both crimes with others. *Id.* at 62-63. However, the Supreme Court in *Penry I* plainly held that the second special issue was not inadequate simply because it only gave effect to Penry's evidence as an aggravating factor; it was dysfunctional independently because it did not allow the jury to give full effect to Penry's mitigating evidence. *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

Third, the state court of criminal appeals held, contrary to *Penry I* that the special issues did not place mitigating qualities of the evidence of Tennard's low I.Q. beyond the effective reach of the jury because "[t]he jury could have used this evidence for a 'no' answer to the first special issue on 'deliberateness.' " *Tennard*, 960 S.W.2d at 62. The Supreme Court in *Penry I* specifically rejected the very same rationale or argument: "Penry's mental retardation was relevant to the question whether he was capable of acting 'deliberately,' but it also had relevance to [his] moral culpability beyond the scope of the special verdict question[n]." *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 185, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) (alteration in original).

Finally, in the concluding paragraph of Section III of *Penry I*, the Supreme Court again expressly rejected all three of the rationales set forth by the Texas Court of Criminal Appeals in the present case for denying Tennard a writ of habeas corpus:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 328, 109 S.Ct. 2934 (internal quotations and citations omitted). In short, the state-court decision in the present case contradicts the holding set forth in *603 *Penry I* because each ruling or rationale set forth in *Tennard* was rejected repeatedly by *Penry I* as not being a constitutionally sound basis for upholding a death penalty under the Texas special issues scheme because that scheme inherently prevents the sentencing jury from fully considering and giving effect to mitigating evidence of mental retardation in determining whether to inflict the death penalty.

3.

The flawed majority opinion reaches an incorrect result because it ignores the authoritative interpretation of 28 U.S.C. § 2254(d) set forth by the Supreme Court in *Williams* for deciding whether the adjudication of Tennard's *Penry I* claim by the Texas Court of Criminal Appeals resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court.

Instead of following the teachings of *Williams*, as set forth and applied in the foregoing sections of this dissent, the majority relies upon and applies prior decisions of this circuit which were based on the dicta, as opposed to the holding, of *Penry I*. The majority concludes that a petitioner, such as Tennard, who makes a *Penry I* claim, "must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder." Maj. Op. at 596-97 (citing *Davis v. Johnson*, 167 F.3d 907, 912

(5th Cir.1999); *Harris v. Johnson*, 81 F.3d 535, 539 n. 11 (5th Cir.1996); *Davis v. Scott*, 51 F.3d 457, 461 (5th Cir.1995)). The cases upon which the majority relies for this nexus rule, and their source, *Madden v. Collins*, 18 F.3d 304, 307 (5th Cir.1994), are based upon the dicta, rather than the holding, of *Penry I*. [FN6]

FN6. The Texas Court of Criminal Appeals relied upon the same dicta for a somewhat similar nexus rule. *See* discussion *supra* p. 598.

The Supreme Court in *Penry I* concluded that the rule sought by Penry--"that when mitigating evidence of mental retardation or abused childhood is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed"--was not a "new rule" under *Teague* because it was dictated by *Eddings* and *Lockett*. *Penry I*, 492 U.S. at 318-19. The Court went on to explain the moral and social principles underlying those decisions as follows:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. Moreover, *Eddings*, makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence.
>
> Thus, the sentence imposed at the penalty stage would reflect a reasoned *moral* response to the defendant's background, character, and crime.

*604 *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934 (internal quotations and citations omitted) (alterations and emphasis in original). Although this passage is enlightening and invaluable to a deeper understanding of the jurisprudence, it is clearly dicta and not part of the holding of *Penry I* which consisted principally of the rule sought by Penry that the Court found had already been announced by *Eddings* and *Lockett*. The Court's explanation of the underlying ethos of prior decisions was dicta and not the holding of *Penry I*.

Assuming that the nexus rule was a proper circuit court embroidery based upon the dicta of *Penry I* and therefore was at one time a binding rule in this circuit, it cannot serve as a precedent in the present case. The Supreme Court made it clear in *Williams* that the statutory phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," in 28 U.S.C. § 2254(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 ("[A]s the statutory language makes clear, § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence."). [FN7] Consequently, *Williams* dictates that we determine whether a state-court habeas corpus adjudication resulted in a decision that was contrary to clearly established Federal law by applying the holdings of the Supreme Court decisions, rather than Supreme Court dicta or our own decisions based on such dicta. Because the nexus rule applied by the majority is based on the dicta of *Penry I*, rather than its holding or the holdings of *Eddings* and *Lockett*, which *Penry I* applied, it should not be applied in the present case.

FN7. *See also Williams*, 529 U.S. at 389-90 & n. 15, 120 S.Ct. 1495 (Stevens, J., concurring, joined by Justices Souter, Ginsburg, and Breyer)("Otherwise the federal law determined by the Supreme Court of the United States might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.... Indeed, a contrary rule would be in substantial tension with the interest in uniformity served by Congress' modification in AEDPA of our previous habeas jurisprudence--now the law on habeas review must be 'clearly established' by this Court alone.... It would thus seem somewhat perverse to ascribe to Congress the entirely inconsistent policy of perpetuating disparate readings of our decisions under the guise of deference to anything within a conceivable spectrum of reasonableness.") (citations omitted).

For the foregoing reasons the decision of the Texas Court of Criminal Appeals was contrary to the clearly established holding of *Penry I* and Tennard should be granted a COA to pursue habeas relief.

284 F.3d 591

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ORIGINAL

No. 02-10038 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JAMES TENNARD,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions at the punishment phase of Tennard's capital murder trial prevented the jury from giving mitigating effect to evidence of his subaverage intellectual functioning.

2. Whether the court of appeals properly refused to consider a claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), that had not been raised in that court, the federal district court, or the state courts of Texas.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Tennard is a Texas death-sentenced inmate seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying him a certificate of appealability ("COA") to appeal the federal district court's judgment denying habeas corpus relief.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals's opinion on direct appeal accurately summarizes the facts of the offense that led to Tennard's conviction and death sentence.

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marijuana with the eventual victims, Larry Neblett and Chester Smith, for about half an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand. [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims. Later that evening, the three men arrived at the home of Fred Stewart and Ruby Montgomery. [Tennard] enlisted Stewart to help sell the proceeds of the robbery. Stewart testified that [Tennard] gave him a couple of gasoline cards which he used to purchase gasoline. Stewart was arrested for the unauthorized use of the credit cards, and this ultimately resulted in [Tennard's] arrest.

Tennard v. State, 802 S.W.2d 678, 679 (Tex. Crim. App. 1990).

The Court of Criminal Appeals's opinion denying habeas corpus relief notes additional facts.

> [Tennard] lived behind the home of the victims, and he knew them. . . . [Tennard] stabbed [Neblett] fifteen times with a knife . . . [and] played a dominant role in disposing of the victims' stolen property. [Tennard] presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders.

Ex parte Tennard, 960 S.W.2d 57, 58 (Tex. Crim. App. 1997).

II. Facts Relating to Punishment

The opinion of the Court of Criminal Appeals on state habeas review also accurately summarizes the evidence presented at the punishment phase of trial.

> [Tennard] had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified [Tennard] and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, [Tennard], who was displaying about a foot-and-a half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."
>
> The victim testified [Tennard] and his friends took her to an abandoned apartment at some government project where [Tennard] forced her to engage in oral, vaginal and anal sex with him. After that, [Tennard's] two friends took turns sexually assaulting her.
>
> [Tennard] and his friends then took the victim to another house where Tennard began using drugs and discussing "pimping out" the victim. She asked [Tennard] if she could go to the bathroom to take a bath, which he allowed her to do:
>
> "Q. Now you told them that you wanted to take a bath?
>
> "A. Yes, I did.
>
> "Q. Did [Tennard] say anything?

"A. He told me I wasn't going to try to run away, was I.

"Q. What did you tell him?

"A. I told him, 'No, baby. I like you. I wouldn't do that.'"

After [Tennard] let the victim go to the bathroom, she escaped through a window, and [Tennard] was arrested later that day. The victim testified [Tennard] appeared to be the leader during her ordeal. [Tennard] impeached her testimony with a prior statement she made from which the jury could have inferred one of [Tennard's] friends was the leader.

[Tennard's] parole officer testified that a Texas Department of Correction's (TDC) record from [Tennard's] incarceration for the rape conviction indicated he had a 67 IQ.

* * * * *

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before [Tennard] committed this [capital murder] offense, and there is a notation on the record indicating [Tennard] had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

* * * * *

This is all the evidence presented at [Tennard's] 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. [Tennard] also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

Ex parte Tennard, 960 S.W.2d at 58-59.

In addition, evidence was presented at trial reflecting that Tennard worked several

days a week at a labor pool, 27 SF 1039;[1] navigated the bus system of the City of Houston, 21 SF 192; was aware of the value of various items and how to sell stolen articles, 21 SF 178, 181, 232; was aware of the need to prevent fingerprints and a method to achieve that goal, 22 SF 405-06; was aware of the need to dispose of physical evidence, 22 SF 413; and was able to care for his nieces and nephews. 27 SF 1022. Although he was represented by a lawyer, Tennard filed several sworn *pro se* pleadings reflecting his knowledge of the offense alleged against him, the circumstances surrounding his arrest, and his ability to comprehend legal principles. Tr 84-113.

In his opening remarks, the second-chair prosecutor explicitly acknowledged that the jury could consider evidence of Tennard's low IQ score:

> I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. . . .

29 SF 72. Thereafter, during the defense's closing argument, Tennard's trial counsel likewise reminded the jury that it could consider all the evidence in answering the special issues, including the evidence of Tennard's low IQ score. 29 SF 85, 93-94. In rebuttal, the lead prosecutor argued that Tennard's IQ score, standing alone, possessed little mitigating value.

---

[1] The statement of facts (record of trial testimony) is referred to "SF," the transcript of papers filed in state court is referred to as "Tr," the and the state habeas corpus record as "*Ex parte Tennard*." Volume numbers precede and page numbers follow all record citations.

> Mr. Scardino [defense counsel] has told you that the Defendant has an IQ of 67. We heard no expert testimony of a psychiatrist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which someone -- we don't know who has -- written in 67.

29 SF 97-98. He also argued that "whether he has a low IQ or not is not really the issue." 29 SF 98.

At the conclusion of the punishment phase, two statutory special issues were submitted to the jury: (1) whether Tennard deliberately killed his victim, and (2) whether there was a probability that Tennard would commit criminal acts of violence that would constitute a continuing threat to society. Tr 170-71.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Tennard advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Punishment-Phase Jury Instructions Were Constitutionally Sound.

A. Standard of review

Before a habeas petitioner can appeal an adverse district court judgment, he must

obtain a COA. 28 U.S.C. § 2253(c)(1). To do so, he must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), *i.e.*, that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1042 (2003). Because a COA is "a jurisdictional prerequisite," without one "federal court of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 1039.

Moreover, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000). Those statutory provisions provide a state prisoner may not obtain relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 1996).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court

> has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

(Terry) Williams v. Taylor, 529 U.S. 362, 412-13 (2000)).

B. The Fifth Circuit's judgment on original submission

On original submission in the court below, Tennard argued that the rule of *Penry I*[2] was violated because the punishment-phase issues that were submitted to his jury did not allow for full consideration of evidence that he is mentally retarded. In rejecting this claim, the Fifth Circuit noted that the Court of Criminal Appeals had found as a factual matter that he is not retarded. Because Tennard did not present clear and convincing evidence to the contrary, the Fifth Circuit correctly held that under the AEDPA it was "required to afford a presumption of correctness to this factual finding." *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1) and *Davis v. Scott*, 51 F.3d 457, 461 n.4 (5th Cir. 1995)). Thus, because Tennard failed to prove that he is retarded, he was not entitled to an additional jury instruction.

> The flaw in Tennard's argument is that he did not establish or argue to the jury that he was mentally retarded. A prison document provided that Tennard had an IQ score of 67. There was no evidence introduced with respect to the meaning of the score, nor its relation to Tennard's moral culpability. As stated, the term "mental retardation" was never articulated before the jury. This dearth of evidence is in stark contrast to the "substantial mitigating evidence that Penry was mentally retarded."

---

[2] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Id. at 596 (quoting *Penry v. Johnson*, 261 F.3d 541 (5th Cir. 2001)).[3] Tennard apparently concedes that this finding forecloses any assertion of mental retardation in fact, as his petition in this Court does not assert that he is retarded and instead argues only that he has established "low intellectual functioning." Petition at i, 4, 11, 13.

The Fifth Circuit also held that Tennard's "claim must fail because he made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d at 597. This holding was based on circuit precedent requiring a habeas petitioner bringing a *Penry* claim to demonstrate that the proffered evidence was constitutionally relevant mitigating evidence that was beyond the effective reach of the jurors. *Davis v. Scott*, 51 F.3d at 460. To be constitutionally relevant, mitigating evidence must demonstrate (1) a uniquely severe permanent handicap, with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this

---

[3] In contrast to Tennard's single IQ score of 67, Penry presented a wealth of evidence of retardation. Dr. Jerome Brown, a clinical psychologist, testified during a competency hearing before trial. *Penry*, 492 U.S. at 307. According to Brown, Penry was mentally retarded, had been previously diagnosed with organic brain damage, and had an IQ at 54. *Id.* at 307-08. Brown's testing also showed that Penry's mental functioning was that of a 6½-year-old, and his social maturity was that of a 9- or 10-year-old. *Id.* At trial, Penry presented the testimony of Dr. Jose Garcia, a psychiatrist. *Id.* "Dr. Garcia [also] testified that Penry suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience." *Id.* He further explained that Penry's organic brain disorder did not permit him "to appreciate the wrongfulness of his conduct or to conform his conduct to the law." *Id.* Penry's mother also testified that Penry always had trouble learning in school and never finished the first grade. *Id.* Moreover, both of the State's psychiatrists "acknowledged that Penry was a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes." *Id.* at 310.

condition. *Id.* at 460-61.

Tennard takes issue with the second prong of this test, arguing that the Fifth Circuit's "nexus" requirement is not supported by this Court's precedent. Petition at 9-14. He is incorrect. *Penry I* is limited in scope, as it was "a straightforward application of our earlier rulings" and "did not 'effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute.'" *Johnson v. Texas*, 509 U.S. 350, 365 (1993) (quoting *Graham v. Collins*, 506 U.S. 461, 474 (1993)). *Penry I* did not announce a "new rule," as it was dictated by *Eddings v. Oklahma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). *Penry I*, 492 U.S. at 318-19.

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

The Court has "not construed the *Lockett* lines of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant." *Johnson v. Texas*, 509 U.S. at 371. Extending the rule of *Penry I* beyond the facts of that case would require overruling *Jurek v. Texas*, 428 U.S. 262 (1976), and "the Texas special issues system in almost every case would have to be supplemented by a further instruction." *Id.* at 372.

Moreover, it would "entail an alteration of the rule of *Lockett* and *Eddings*. . . .[so as to] require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.*

Following this line of authority, the Fifth Circuit "has limited *Penry* to the facts of that case; in other words, in all of the cases we have considered, we have found a *Penry I* problem to exists only where the petitioner presents mitigating evidence relating either to severe mental retardation or extreme child abuse." *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002). For mitigating evidence to be constitutionally relevant, the defendant "must demonstrate that there is a nexus between the criminal act and the mitigating evidence presented to explain it." *Id.* at 681 (citing *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997)). The nexus requirement is met if the evidence would allow a rational jury to infer that the crime is at least partially attributable to the defendant's background. *Id.* Of particular relevance to Tennard's claim, the Fifth Circuit consistently has held that evidence of subnormal intellectual functioning does not warrant an additional instruction where the petitioner fails to show that the criminal act was attributable to his low intelligence. *Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996); *Lackey v. Scott*, 28 F.3d 486, 489 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994).

Tennard argues that the nexus rule is based on this Court's dicta and thus "is not a proper basis for determining the merits of a *Penry* claim." Petition at 10. In the court below, Judge Dennis likewise argued in dissent that "the majority relies on and applies prior

decisions of this circuit which were based on the dicta, as opposed to the holding, of *Penry I*." 284 F.3d at 603. According to Judge Dennis, this Court's interpretation of the statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in *Williams v. Taylor* "dictates that we determine whether a state-court habeas corpus adjudication resulted in a decision that was contrary to clearly established Federal law by applying the holdings of the Supreme Court decisions, rather than Supreme Court dicta or our own decisions based on such dicta." *Id.* at 604.

There are two flaws in this approach. First, contrary to Judge Dennis's view, implicit in the holdings of *Lockett, Eddings*, and *Penry* is that death-sentenced prisoners be required to demonstrate a connection between purportedly mitigating evidence and their criminal acts. The "attribution" requirement of *Lockett, Eddings*, and *Penry* is not "mere *obiter dicta*, but rather . . . the well-established rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound." *Id.* The approach utilized by the court below is entirely consistent with, at the least, the underlying basis for decision in *Lockett, Eddings*, and *Penry*.

Second, and perhaps of greater significance, there is no requirement that the Fifth Circuit's nexus rule be based on "clearly established Federal law." That statutory phrase is a codification of the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). *Williams*

v. Taylor, 529 U.S. at 379.

> The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." . . . It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent on a rule of law not clearly established at the time the state conviction became final.

Id. at 379-80. In this context, consistent with *Teague*, the statute also limits the source of clearly established law to decisions of this Court. Moreover, the phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

Plainly, then, "clearly established law" represents a hurdle that a habeas petitioner must surmount to obtain relief under the AEDPA. By contrast, the prohibition against new rules has no application in determining whether a rule that limits a defendant's right to federal habeas review should be applied retroactively. *Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993). Consequently, "the State will benefit from [the] *Teague* decision in some federal habeas cases, while the habeas petitioner will not." *Id.* at 373. Thus, even if the Fifth Circuit's nexus rule is based on this Court's dicta rather than its holdings, which the Director denies, it nonetheless constitutes a valid basis for deciding *Penry* claims. *See, e.g., Brown v. United States*, 2003 WL 1989618 (9th Cir. 2003) (in light of Supreme Court dicta, "only the most persuasive arguments to the contrary would give us pause"); *United States v. Fareed*, 296 F.3d 243, 247 (4th Cir. 2002) (following dictum endorsed by six justices); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) ("Appellate courts have noted

that they are obligated to follow Supreme Court *dicta*, particularly where there is no substantial reason for disregarding it . . . ."); *United States v. Caro*, 260 F.3d 1209, 1210 (10th Cir. 2001) ("we accord great weight to the dicta of the Supreme Court"). Regardless whether the Fifth Circuit's nexus rule is based on clearly established law within the meaning of the AEDPA, it is an appropriate analytical tool for determining whether a capital murder defendant's proffered mitigating evidence warrants a supplemental jury instruction under *Penry*.

Moreover, contrary to Tennard's implications, the rule is not used to defeat petitioners's otherwise meritorious *Penry* allegations, but, rather, to winnow out valid claims based on evidence similar to that offered by Penry. Illustrative of this point is *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. 2002), in which the court of appeals affirmed the district court's grant of relief on a *Penry* claim. "The facts of this case are different from those in *Tennard*. The record evidence raised an inference sufficient to satisfy *Tennard's* requirements of handicap and nexus to the crime." *Id.* at 321. Tennard's arguments against the nexus rule do not raise a debatable federal constitutional issue, much less one important enough to warrant exercise of this Court's certiorari jurisdiction.

C. The Fifth Circuit's judgment on remand

After the Fifth Circuit's initial denial of a COA, Tennard sought certiorari review of his *Penry* claim; this Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)."

Tennard v. Cockrell, 123 S. Ct. 70 (2002). On remand, the court of appeals refused to consider any claim based on *Atkins* and reinstated its panel opinion affirming the district court's denial of habeas relief. The court noted that "Tennard has never argued that the Eighth Amendment prohibits his execution." *Tennard v. Cockrell*, 317 F.3d 476, 477 (5th Cir. 2003). "Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us." *Id.* (citing *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002), and *Smith v. Bowersox*, 311 F.3d 915, 923 (8th Cir. 2002)).

According to Tennard, he argued in his previous petition for writ of certiorari "that the then-recent decision in *Atkins v. Virginia* . . . made the use of the nexus rule in a case like his inappropriate." Petition at 7-8. Thus, he argues, the Fifth Circuit did not comply with the remand order because "[i]t did not consider the effect of *Atkins v. Virginia* on its resolution of the *Penry* issue . . . ." Petition at 8. He is incorrect.

Atkins set out a bright-line rule prohibiting the execution of mentally retarded individuals. Under *Atkins*, a capital defendant who establishes mental retardation is constitutionally protected, and *Penry* and its progeny do not come into play. In short, *Atkins* has no bearing on the resolution of *Penry* issues, and thus this Court's remand order could not have contemplated reconsideration of Tennard's *Penry* claim in light of *Atkins*. Instead, because Tennard's prior petition raised the possibility of mental retardation, including a sub-70 IQ score, remand was a prudent disposition to protect against the possibility of a

substantive *Atkins* violation.

Likewise, the Fifth Circuit acted prudently in refusing to consider a claim that was not properly before it. Tennard does not, because he cannot, cite any authority for the proposition that his case is an exception to the general rule that appellate courts will not consider unassigned error. *E.g., Smith v. Cockrell*, 311 F.3d at 685 ("We have consistently refused to address issues in the habeas context raised for the first time on appeal"). Indeed, the refusal to do so is particularly appropriate with regard to allegations based on *Atkins*. Tennard never has presented his *Atkins* claim to the state courts and thus has not exhausted his state remedies as required by 28 U.S.C. § 2254(b). He can return to state court to do so, however, and then reurge the matter in federal court if state-court relief is not forthcoming. This approach is consistent with the Fifth Circuit's recognition that

> [i]n these circumstances, inferior federal courts have no useful role to play until and unless following *Atkins*, a death sentence is reaffirmed or again imposed on Bell by the state courts. Just how the state courts will implement *Atkins*, we cannot say. Clearly, however, the state must be given the first opportunity to apply the Supreme Court's holding in order to insure consistency among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule.

Bell v. Cockrell, 310 F.3d 330, 332-33 (5th Cir. 2002). *See also Smith v. Cockrell*, 311 F.3d at 685 ("As the Texas courts have not yet had [the] opportunity [to develop standards for defining who is ineligible for execution under *Atkins*], we decline to usurp their position as the ultimate arbiter of state law"); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (the State "should have the opportunity to develop its own procedures for determining whether

a particular claimant is retarded and ineligible for death"). The Fifth Circuit's remand order is entirely consistent with established appellate procedures and does not present a cert.-worthy federal constitutional issue.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Tennard's petition for writ of certiorari be denied.

Respectfully submitted,

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No. 02-10038

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JAMES TENNARD,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 5th day of June, 2003, one copy of **RESPONDENT'S BRIEF IN OPPOSITION** was sent by United States mail to: Mandy Welch, Burr & Welch, 10511 Dunbrook Drive, Houston, Texas 77070. All parties required to be served have been served. I am a member of the Bar of this Court.

CHARLES A. PALMER
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OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 5, 2003

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Robert James Tennard v. Janie Cockrell*, No. 02-10038

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1600

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cc: Mandy Welch
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SEP 29 PAGE 4

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No. 02-10038

IN THE
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October Term, 2002

ROBERT JAMES TENNARD
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v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent-Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's Reply to Respondent's Brief in Opposition

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ATTORNEY FOR ROBERT JAMES TENNARD

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Secondary Authority

American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th Ed. May, 2002) 3-4

IN THE
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner's Reply to Respondent's Brief in Opposition

Argument

Respondent Cockrell argues that the Court's October, 2002 remand of Mr. Tennard's case for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), was merely to be sure Tennard did not present an *Atkins* claim. As she states in her Brief in Opposition, "because Tennard's prior petition raised the possibility of mental retardation, including a sub-70 IQ score, remand was a prudent disposition to protect against the possibility of a substantive *Atkins* violation." *Id.* at 14-15.

Such an argument trivializes the remand decision in Mr. Tennard's case. A remand decision is not lightly made and is, in undersigned counsel's experience, never exercised to "protect" against mere "possibilities."

Moreover, the Court did not need to remand to the Fifth Circuit for such "protection," because counsel for Mr. Tennard was very explicit in informing the Court in the July, 2002 petition for writ of certiorari that Tennard was not presenting, and had not presented, an *Atkins* claim. Counsel argued expressly in that petition that Tennard raised only a *Penry*[1] claim. She did not try to stretch that claim into an *Atkins* claim. Indeed, she urged the Court to examine the *Penry* claim and not take any comfort in the possibility that the result of Mr. Tennard's unconstitutional penalty trial would be taken care of in the future by a yet-to-be-presented *Atkins* claim:

> The decision in *Atkins v. Virginia* should not be seen as somehow mooting out the need to address the *Penry I* violation in this certiorari proceeding. *Whether or not* Mr. Tennard is able to satisfy a yet-to-be-defined evidentiary standard for establishing mental retardation in future proceedings brought under *Atkins*, his present death sentence violates the Eight Amendment under *Penry v. Lynaugh*. Mr. Tennard's evidence of subnormal intellectual functioning presented at his sentencing trial was indisputably mitigating, yet his sentencer was precluded from considering it or giving it mitigating effect under the pre-*Penry* special issues. The prosecutor argued that the jury could not take this evidence into account without violating the law, and defense counsel tried to suggest a way for the jury to take it into account despite the law. These circumstances establish a *Penry I* violation as surely as they did in Mr. Penry's original trial.

---

[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Petition for Writ of Certiorari, *Tennard v. Cockrell*, No. 02-5164, filed July 3, 2002, at 17-18. In short, the basis for the Court's remand in light of *Atkins* could not have been to assure itself that there was no *Atkins* claim. The remand, therefore, must have been concerned with the new light cast upon *Penry* claims by *Atkins*.

That light goes directly to the Fifth Circuit's disposition of Mr. Tennard's *Penry* claim. As we have argued in the present petition for writ of certiorari, the light cast by *Atkins* is the recognition that any *Penry* claim based on evidence that is consistent with the defendant having mental retardation – whether or not the trial jury would have found, if directly asked, that the defendant actually has mental retardation – is a meritorious claim under the pre-*Penry* Texas sentencing procedure. *Atkins* makes clear that such evidence, whether it conclusively establishes mental retardation or not, constitutes mitigating evidence as a matter of law, and a capital sentencer must be allowed to give it mitigating effect under the instructions.

Mr. Tennard's counsel presented evidence consistent with mental retardation. He presented evidence that the Texas prison classification process determined, when Mr. Tennard was seventeen years old, that he had an IQ of 67. He also presented evidence that Mr. Tennard functioned in the world like a person who had an IQ of 67. Specifically, he showed that Tennard's judgments were naive and reflected gullibility and simplicity. An IQ of 67, measured before the age of eighteen, concurrent with impairments in adaptive behavior such as naivete and gullibility, are consistent with mental retardation. *See* American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th Ed. May, 2002), at 1, 82 (noting the settled elements of mental retardation – "significant limitations both in intellectual functioning and in adaptive behavior ... originat[ing] before the

age of 18" – and further noting that gullibility and naivete reflect limitations in adaptive behavior).

When Mr. Tennard's trial counsel presented this evidence, neither *Atkins* nor *Penry* had been decided. Thus, there was no reason to frame for the jury the question of whether Mr. Tennard actually had mental retardation. In failing to conclude that this evidence, in conjunction with the pre-*Penry* "special issue" sentencing instructions and the arguments of counsel in Tennard's case, established a *Penry* violation, however, the Texas Court of Criminal Appeals and the Fifth Circuit got sidetracked by whether this evidence conclusively established that Mr. Tennard had mental retardation. That question was not relevant to whether there was a *Penry* violation. The relevant questions were (1) whether this evidence was mitigating, and (2) whether the jury had any means of giving this evidence mitigating effect through the special issues.

The remand in Mr. Tennard's case answers the first question. The evidence presented at Tennard's sentencing proceeding, which was consistent with mental retardation, was constitutionally mitigating. *Atkins* established at least this much with respect to evidence that is consistent with mental retardation. It constitutes mitigating evidence as a matter of law. That is why this Court remanded for reconsideration of Tennard's *Penry* claim in light of *Atkins*.

Second, this evidence could not be given any mitigating effect under the special issues provided to Tennard's jury. As the Court explained in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), the determinative question under *Penry* is whether "the jury had a meaningful basis to consider the relevant mitigating [evidence]...." In *Johnson*, the mitigating evidence was youth. The Court determined that the aspects of youth that both supported future-dangerousness and were also mitigating – impulsivity and recklessness – nevertheless could be given mitigating

effect under the Texas scheme:

> The evidence of petitioner's youth ... falls outside *Penry*'s ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Id.

By contrast, "the jury had [no] meaningful basis to consider," *Johnson v. Texas*, 509 U.S. at 369, the mitigating aspects of the evidence of Mr. Tennard's significant limitations in intellectual functioning and its attendant manifestations in his naive – and deficient – judgments. The defense could only urge the jury, in "tak[ing] all things into consideration" in answering the special issues, SF 29:94, that it answer one of the issues, "no." This plea was based solely on an appeal to the jury's sympathy for a person like Mr. Tennard, not an any logical relationship the evidence bore to the special issues. Indeed, there was no way for the jury to give Mr. Tennard's intellectual impairment and lesser capacity to make socially appropriate judgments mitigating effect in answering the two special issues, because this evidence bore no logical mitigating relationship to the issues. The prosecutor thereafter made this point and confirmed the *Penry* violation when he argued that the only relationship this evidence bore to the special issues was as aggravating evidence – *i.e.*, the evidence established only "why he became a danger...." SF 29:98. Unlike the evidence of youth in *Johnson*, there was no indication that the limitations in Tennard's intellectual functioning and adaptive behavior were subject to change. These limitations were just as permanent as the diagnosed mental retardation in *Penry*. There was no way for the jury to mitigating effect to this evidence under the pre-*Penry* special issues.

From this perspective, it does not matter whether the Texas Court of Criminal Appeals determined in state habeas proceedings that the evidence of mental retardation at Mr. Tennard's trial was insufficient to establish mental retardation. This determination was a red herring that blinded both the Court of Criminal Appeals and the Fifth Circuit to the *Penry* violation in front of them. It precluded them from analyzing whether the evidence at trial – which at the very least established significant intellectual impairment and adaptive behavior deficits prior to the age of eighteen that was similar to mental retardation – could have been given any mitigating effect.

Conclusion

In short, the remand to the Fifth Circuit in 2002 in light of *Atkins* was a message to the Fifth Circuit to treat evidence of intellectual deficiency that is consistent with mental retardation in the same way evidence of mental retardation is treated for purposes of *Penry* claims. For this reason, the Court should grant the present petition for writ of certiorari and vacate Mr. Tennard's death sentence for violating the Eighth Amendment rule of *Penry v. Lynaugh*.

Respectfully submitted,

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Certificate of Service

I hereby certify that I served a copy of the Petitioner's Reply to Respondent's Brief in Opposition in the above-styled case, on counsel of record for Respondent by depositing this document with the United States Postal Service, first class postage prepaid, addressed to Assistant Attorney General Charles Palmer, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, whose telephone number is (512) 936-1600, this 9th day of September, 2003.

All parties required to be served have been served.

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Counsel of Record for Petitioner Tennard

Supreme Court, U.S.
FILED
NOV 25 2003
OFFICE OF THE CLERK

No. 02-10038

In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Docket Sheet, *Tennard v. Johnson*, No. 4:98-CV-4238, U.S. District Court, Southern District of Texas

2/19/98	2	ORDER granting [1-2] motion to proceed in forma pauperis entered; Parties notified. Petitioner may proceed in forma pauperis in federal habeas proceedings challenging his capital conviction and death sentence, and Mandy Welch of Burr & Welch, Houston Tx. is appointed to represent him. (signed by Judge Lynn N. Hughes) (bj) [Entry date 02/20/98]
12/18/98	3	Prisoner Petition for Writ of Habeas Corpus Death Penalty Case; filed. (bj)
3/30/99	11	MOTION with brief in support for summary judgment by Gary Johnson, Motion Docket Date 4/19/99 [11-1] motion, filed (hl)
4/28/99	15	RESPONSE by Robert James Tennard to [11-1] motion for summary judgment, filed. (hl) [Entry date 04/29/99]
4/28/99	15	CROSS MOTION for summary judgment with Brief in Support by Robert James Tennard, Motion Docket Date 5/18/99 [15-1] cross motion, filed (hl) [Entry date 04/29/99]
7/25/00	19	OPINION on Denial of Writ of Habeas Corpus, entered. Parties notified. (signed by Judge Lynn N. Hughes) (lt)
7/25/00	20	FINAL JUDGMENT denying [3-1] petition for writ of habeas corpus; granting respondent's [11-1] motion for summary judgment; denying petitioner's [15-1] cross motion for summary judgment, entered.

Petitioner's anticipated motion to stay his execution until an anticipated appeal is heard is denied. Parties ntfd. (signed by Judge Lynn N. Hughes) (lt)

10/12/00 25 NOTICE OF APPEAL of [24-1] order by Robert James Tennard, filed. Fee Status: IFP (bwd) [Entry date 10/13/00]

10/17/00 27 ORDER denying Pltf's [26-1] motion for certificate of appealability, entered; Parties notified. (signed by Lynn N. Hughes) (hl) [Entry date 10/18/00]

Docket Sheet, *Tennard v. Cockrell*, No. 00-20915,
U.S. Court of Appeals for the Fifth Circuit

10/20/00 Death penalty case docketed. NOA filed by Appellant Robert James Tennard [00-20915] Awaiting DC Action on 12/4/00. (COA pending DC) (mrw)

11/1/00 District Court notice – COA denied (IN ROA). Date Denied: 10/18/00 [00-20915] Awaiting DC Action ddl satisfied. Motion for COA due on 12/12/00 for Robert James Tennard. Brief in support of COA due on 12/12/00 for Robert James Tennard. (mrw)

1/12/01 Brief filed in support of motion for Certificate of Appealability [3108656-1] by Appellant Robert James Tennard Brief in Support ddl satisfied. [3108657-1] [00-20915] (mrw)

2/1/01 Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3108656-1] by Appellant Robert James Tennard Response/Opposition ddl satisfied. [3126501-1] [00-20915] (mrw)

3/1/02 Opinion filed. Issd in T form? Y Issue mandate due 3/1/02 (ISSUED AS & FOR THE MANDATE) [00-20915] (rmf)

3/1/02 COURT Order filed denying appellant's motion for Certificate of appealability [3108656-1] Copies to all counsel [00-20915] (rmf)

3/19/02 Petition filed by Appellant Robert James Tennard for rehearing en banc. #of copies filed: 20 [3643618-1] Sufficient [Y/N]: y. [00-20915] (mrw)

4/4/02 COURT Order filed denying petition for rehearing en banc [3643618-1] With poll (Y/N)?: n Copies to all counsel. [00-20915] (mrw)

10/15/02 Supreme Court order received granting petition certiorari [3757788-1] by Appellant Robert James Tennard on 10/07/02. [00-20915] (cav)

11/13/02 Supreme Court judgment filed. [00-20915] (jbr)

1/3/03 Case reopened. [00-20915] (rmf)

1/3/03 Opinion filed on Remand from the United States Supreme Court reinstating our panel opinion. Issd in T form? Y Issue Mandate due on 1/24/03. [00-20915] (rmf)

1/3/03 Judgment entered and filed. [00-20915] (rmf)

10/20/03 Supreme Court order received granting petition certiorari [4161264-1] by Appellant Robert James Tennard on 10/14/03. [00-20915] (cav)

Trial testimony of Valerie Soto, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts (trial transcript), 27-47]

* * *

[27] VALERIE SOTO

was called as a witness by the State, and after having been previously duly sworn, testified under her oath as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q Would you state your name for the ladies and gentlemen of the jury, ma'am?

A Valerie Soto.

Q How old are you, Ms. Soto?

A Thirty-three.

Q Do you have any children?

A Yes. I have two.

Q What are their ages?

A Thirteen and four.

Q Are you married, divorced, single?

A Divorced.

Q Have you ever been known by the name of Valerie Ruth [28] Ewing?

A Yes. That's my maiden name.

Q Let me ask you to go back to August 7th, 1979, and I will ask you where you were working at that time.

A Mustang Tractor and Equipment.

Q What did you do with them?

A I was a PBX operator.

Q What's the address?

A 12800 Northwest Freeway.

Q Where were you living?

A In North Houston, on Sherry Spring Road.

Q Who were you living with?

A A roommate, Melissa Fairchild.

Q Anybody else?

A My son.

Q And how old was he at the time?

A Approximately four or five.

Q Let me ask you, in the early morning hours of August 7th, 1979, did you have occasion to come in contact with a Robert James Tennard?

A Yes, I did.

Q Is that individual here in the courtroom?

A Yes, he is.

Q Would you point him out and describe the clothing he's wearing?

[29] A He's right there. He has on a white shirt, with a black tie.

MR. CROWLEY: Your Honor, may the record reflect she has identified the Defendant?

THE COURT: The record will so reflect.

Q Do you recall where it was that you first met him that day and when?

A Yes. It was in the early morning hours. I wa [sic] waiting at the bus stop for the bus.

Q Where was the bus stop?

A At Crosstimbers and 45.

Q Where were you going?

A To work.

Q And how had you gotten to the bus stop?

A My roommate dropped me off.

Q Did you work in the daytime, basically?

A Yes, I did.

Q What time did your roommate drop you off at the bus stop?

A About ten minutes to 6:00.

Q And you were waiting there for the bus?

A Right.

Q How was it that you first met Mr. Tennard?

A He and two other guys pulled up in a car and he was [30] sitting on the passenger side and he got out and jerked me into the car.

Q Did he say anything to you when he jerked you in?

A They threw me in the back seat. The guy in the back seat held me down and he said, "Move, white bitch, and you're dead."

Q Who said that?

A He did, Robert Tennard.

Q How many people were in the car?

A Besides myself, three.

Q Did they call each other any names while they were in the car?

A Yes.

Q What did they call Tennard?

A Black.

Q And what were the other two names that you heard?

A Michael and Doug.

Q Which part of the car did they put you in, the back passenger or the front seat?

A The back.

Q What happened when you were in the back seat? Who was in the back seat with you?

A The guy they called Doug.

Q Where was Tennard sitting?

A In the passenger right front.

[31] Q What happened next? Did Mr. Tennard make any further threats to you:?

A Not at that time.

Q Did you drive for some distance?

A Yes, we did.

Q And which way did you drive?

A I really couldn't tell. They were holding me down; the guy in the back seat was holding me down. He had his hand on my head and holding my head down.

Q Now did Mr. Tennard ever display any type of weapon?

A Yes. He had some kind of pipe wrench.

Q How big was it?

A I'd say about a foot-and-a-half long.

Q What did he do with the pipe wrench?

A He shook it in the air at me. That's at the same time when he had said, "Move, white bitch, and you're dead."

Q Did he make any other threats to you later on?

A They took me to these apartments and he found a round stick laying on the ground, and I can't remember his exact words.

MR. CROWLEY: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Ms. Soto, let me ask you to look at this statement and see if you can refresh your memory here.

[32] MR. SCARDINO: We object to the prosecutor bringing a document to the witness and asking her to review it to refresh her memory without any indication of what the document is. The witness needs to be able to testify on her own without any assistance from the prosecutor.

THE COURT: She is allowed to refresh her memory.

If you want to identify that for the record, Mr. Crowley.

MR. SCARDINO: She would be able to refresh her memory with her own notes and not what the prosecutor reads.

MR. CROWLEY: Basically the law says that a witness can refresh their memory from anything.

MR. SCARDINO: Could we have her testify without reviewing the document first?

THE COURT: She's entitled to refresh her memory from the document, if that's what she's doing. Overruled.

Q Have you had an occasion to refresh your recollection?

A I guess.

Q Let me ask you, do you remember if Mr. Tennard made any verbal threats to you?

[33] A At the apartments where they took me to, yes, he did.

Q Let me go back. While you are still in the car, did you have any money with you?

A Yes, I did.

Q What did you have?

A I had $2.25 cents.

Q And what became of that $2.25 cents?

A Robert Tennard took it out of my purse.

Q Did he take the $2.25 cents?

A Yes, he did.

Q What was going through your mind at this time?

A That I was going to be raped and killed.

Q Now where did they take you?

A They took me to a government project.

Q Where was it located, do you remember?

A Well we were on the freeway, and as I stated, they were holding my head down in the back. The only thing

that I saw was a sign that said Calles Road. It was spelled C-a-l-l-e-s.

Q Calles?

A That could be the pronunciation.

Q And where did you go when you got out in that area?

A They took me upstairs to a vacant apartment.

Q How did they get you up to the apartment?

A They held me by my arms.

[34] Q Who held your arms?

A Robert and the one named Michael.

Q At that point did Mr. Tennard ever pick up any other type of weapon?

A He picked up a stick that I would say was about three feet long, and it was round, like something you would hang your clothes on, and he told me not to try anything funny or he would use it on me.

Q Did you believe him?

A I certainly did.

Q What happened when you got into the apartment?

A They took me to one of the bedroom.

Q Was it furnished or was anyone living there?

A No, it was a vacant apartment. It had no carpet. Wood floors. It was really dirty.

Q And what happened inside the bedroom?

A I was raped.

Q Could you go through the sequence? I know it's difficult for you to do, but if you would tell us what happened first.

A First they made me have oral sex with them.

Q Which one, Michael, Tennard or Doug?

A Tennard was first.

Q Would you state what he did, basically?

A He made me have oral sex and then he had regular sex [35] with me and then he had anal sex with me.

Q Were you ever ordered to take your clothes off?

A Yes, I was. When we got in the room, he instructed me to take my clothes off.

Q Were you lying on the floor?

A Yes. He told me to lay down on the floor.

Q What was the condition of the floor?

A It was very dirty.

Q What happened after Mr. Tennard finished?

A Michael came in.

Q And what did he do?

A The same thing.

Q How did Michael know when to come in?

A Robert got up and opened the door and told him it was his turn.

Q And what happened after Michael was through?

A The same sequence, he went and got the one called Doug.

Q Who went and got the one called Doug?

A Michael.

Q And what did Doug do?

A He just had vaginal intercourse with me.

Q And what happened after that?

A They told me to put my clothes on and then we got in the car and left.

Q Did Tennard say anything during the time he was [36] assaulting you?

A Not that I can remember.

Q Now, how were you escorted out of the apartment?

A The same way I was escorted in: One on each side of me and one in the back.

Q Who was in the back?

A The one called Doug.

Q Did the club ever appear again?

A Yes. He carried it in his hand, Robert Tennard did.

Q Where did you go from the apartment? Did you go to the car?

A Went to the car and from the car they took me to a house of someone they knew.

Q Do you know where the house was?

A I don't recall.

Q What happened when you got to the house?

A They were sitting – well, when we first got there, no one came to the door, and finally a guy in a black car drove up and they took me inside and they were sitting around, smoking pot, and they were taking some kind of pills, I don't know what. They asked me if I wanted some and I said no.

Q Was Tennard taking pills and smoking marijuana?

A Yes.

Q Were any threats made to you by Mr. Tennard at the [37] house?

A No. He just was discussing with his friend that drove the black car how he wanted to pimp me out.

Q Did he say anything about some other girls that hadn't done what he wanted?

A I recall him making the remark about something about a girl who didn't do what he wanted and she was dead now.

Q What happened at the house? Did you tell him you had to go somewhere?

A Yes. I told him I had to go take a bath. I told him that I wanted to take a bath. I felt really nasty and dirty.

Q How many people were at this house?

A I saw three or four. I saw three or four people.

Q Had you actually gotten physically dirty from that apartment floor?

A Yes, and from them.

Q Now you told them that you wanted to take a bath?

A Yes, I did.

Q Did Mr. Tennard say anything?

A He told me I wasn't going to try to run away, was I.

Q What did you tell him?

A I told him, "No, baby. I like you. I wouldn't do that."

Q Did he seem to buy this statement?

[38] A Yes, he did.

Q And what did you do?

A I went in the bathroom. I locked the door. It had a latch. It didn't have a doorknob lock. It had a latch. I locked the door.

Q You had your clothes back on at this time?

A I had my clothes on, yes. I locked the door. I turned on the bath water, went and looked at the window, found I could open it, stood on the toilet, pushed out the screen and jumped out the window.

Q And what happened when you jumped out the window?

A I ran to the next street over.

Q Did you find somebody on the next street?

A I had to knock on four or five doors, but finally someone did answer the door.

Q And what did you ask that person to do?

A I asked him if I could use their phone to call the police, that I had been raped.

Q And did they let you use the phone?

A Yes, they did.

Q Did some police officers show up?

A Yes, they did.

Q How soon after the call did they show up?

A I'd say approximately 20 or 25 minutes.

Q Do you recall who the officers were?

[39] A I don't recall their names. I do remember the officers.

Q Have you seen them here today?

A Yes, I have.

Q Now what happened when the officer arrived?

A He told me to get in the car, that he was going to take me downtown, because I didn't have any transportation. And I got in the car and I told them that I could show him where the house was where they had me.

Q Did you point out the house?

A Yes, I did. And at the time that we were turning the corner onto the street, the cars that they were in were driving away. They were leaving the house.

Q Did you point the car out to the officers?

A I pointed the car out to the officers that Robert Tennard was driving, and he attempted to chase the car and we lost it, but we spotted it stopped on another street.

Q After you spotted or saw the car, did you give the officer a description of him to put out on the radio?

A Yes, I did.

Q Was somebody brought back after you lost sight of him?

A Yes.

Q And who was brought back?

A Robert Tennard.

[40] Q And how was he brought back to where you and the officer were?

A By another unit.

Q At that time did you identify him as the person who had assaulted you?

A Yes, I did.

Q Let me ask you, of the three people that were involved in this, who did most of the talking?

A Robert Tennard.

Q Who appeared to you to be the leader?

A Robert Tennard.

MR. CROWLEY: Pass the witness, Your Honor.

THE COURT: Mr. Scardino.

CROSS EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Is it Mrs. Soto?

A Yes, it is.

Q Mrs. Soto, I want to ask you some questions about what you have testified to, and you may refresh your memory with whatever you want to remember, unfortunately, the incident that you just testified about. Okay?

Now you told the jury that three men pulled up, Tennard got out and drug you into the car, [41] threatened you with a wrench, then you got in the back seat and Tennard was in the front seat and they drove you to a house, where Tennard was the leader, and took you upstairs in a dirty room and Tennard had sex with you orally, vaginally and anally; is that right?

A That's correct.

Q And that they then took you to another location, where Tennard wanted you to be his old lady and asked

you if you would turn out for him or be a prostitute or a whore for him; is that right?

A He never asked me. He was discussing it with his friends.

Q And it was Tennard doing all that?

A Yes, it was.

Q And it was Tennard that you said did most of the talking and was the leader?

A Yes.

Q And you're sure about all that?

A Yes.

Q How long ago did all of that happen?

A It was in 1979.

Q And when it all happened, what you told this jury is the best of your recollection of what happened back then as you remember it now?

A That's correct.

[42] Q And it was a bad e- perience, it was a horrible experience, wasn't it?

A Yes, it was.

Q And at the time the police wanted to get all the information they could from you so that they could prosecute the men that had assaulted and raped you, did they not?

A I'm sure.

Q In fact, they took a statement from you, didn't they?

A Yes, they did.

Q And at the time you gave them a statement, do you remember how long after the incident that you gave them a statement?

A Two-and-a-half, three hours at the most.

Q So just right after it happened, you told the police about it; isn't that correct?

A Right after I got away.

Q And were you suffering from any sort of impediment that would keep you from remembering what happened? Like, were you sedated in any way or under the influence of any drugs or alcohol?

A No. I don't use drugs.

Q Well, I wasn't suggesting that you did. I was just going to ask you whether or not a doctor or somebody had sedated you as a result of your incident.

[43] A I did not go to the hospital first. I went directly to the Police Station.

Q And that's when you gave them the statement?

A Yes.

MR. SCARDINO: Could I see that, please?

MR. CROWLEY: Yes. Your Honor, I am tendering a copy to Mr. Scardino.

MR. SCARDINO: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Now, Mrs. Soto, when you gave the police the statement right after it happened, it was a different statement than what you have told this jury, is it not?

A I don't understand how.

Q Well, didn't you tell the police that the man that was the leader was a guy named Michael and that the guy that raped you initially, orally, vaginally and anally was a guy named Michael, that took you in and raped you, and after he got through, that the guy named Black came into the room and that Black made you have oral sex with him and then have regular sex with him. Did you not state that in your statement? The first guy was Michael who had sex with you in three different ways?

[44] A That's what is says.

Q It wasn't Robert Tennard, then was it?

A That's what it says.

Q And then it says the next guy that came in and had oral and vaginal sex and not anally?

A It does say that.

Q Then on the same page, "Michael then told me he wanted me to be his old lady. At this point, Michael had finished and he got up."

A I never said that Tennard asked me to be his old lady.

Q You didn't just tell that to the jury?

A No, I said he was discussing with his friends that he wanted to pimp me out.

Q But it was Michael that, you said, back in your statement on August 7th, 1979, that was doing the talking to you about something as absurd as being his old lady?

A Yeah, but he never threatened to kill me.

Q It was Tennard that threatened to kill you?

A Yes, it was.

Q Do you know where Michael is now?

A I sure don't.

Q Do you know whether or not Michael was ever caught and prosecuted?

A I never – no.

[45] Q No idea? How about Doug, was he ever caught and prosecuted?

A He was caught, but I never definitely could ID him.

Q Doug was the one that told you – who was driving the car?

A Michael, at first.

Q And then is what you told the police back in '79, that it was Michael that had had sex with you first and it was Michael that asked you to be his old lady?

A That's what my statement says.

Q And that's not what you just told this jury; is that correct?

A I did not tell the jury that Michael had sex with me first.

Q You told the jury that Tennard is the one that took you in the room first and had sex with you in three different ways?

A Yes, I did.

Q And that's just not what happened, though, is it?

A That's not what my statement says, no.

Q And then the last thing was that you asked if you could go clean up and one of the men that was there asked if you were going to try to get away; is that right?

A That's right.

Q And that was Robert Tennard, you said?

[46] A Yes, it was.

Q Was he drunk?

A He was probably high.

Q Did you see him smoking marijuana?

A Yes, I did.

Q Well, he wasn't so high that he couldn't rape you; is that correct? He raped you, did he not?

A He wasn't smoking pot at the time either.

Q Did you see how many cigarettes he smoked?

A No.

Q Well, was he acting different after he raped you than before he raped you?

A No.

Q Then you asked him if you could go clean up?

A I asked him if I could go take a bath.

Q And he said something to you?

A Yes, he did.

Q Tell the jury again what he said.

A He said, "You're not going to try to get away from me, are you?"

Q And you said no?

A I said, "No, I'm not. I like you."

Q And he let you go and take a bath?

A He let me go take a bath, yes.

Q And there was a window that could be opened in the [47] bathroom and you made your escape?

A Yes.

Q Thank you, ma'am.

MR. SCARDINO: Pass.

MR. CROWLEY: No further questions, Your Honor.

THE COURT: May this witness be excused?

MR. CROWLEY: Yes, Your Honor.

THE COURT: Ms. Soto, you may be excused.

* * *

Defense evidence, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts (trial transcript), 56-70]

* * *

[56] WILLIAM KINARD

was called as a witness by the Defense, and after having been previously duly sworn, testified under his oath as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q State your name, please.

A William Kinard.

[57] Q Tell the jury what you do for a living.

A I work for the Board of Pardons and Paroles. I'm a parole officer.

Q How long have you worked as a parole officer?

A Right at about two years.

Q Did you ever have a parolee in your charge by the name of Robert Tennard?

A Yes, sir.

Q And have you appeared here under my subpoena?

A Yes, sir.

Q And did I ask you to bring any records with you besides bringing yourself?

A Yes, sir.

Q And what was that?

A You asked me to bring the records indicating Mr. Tennard's IQ level, as far as what TDC has.

Q Did I ask you to bring the records of Mr. Tennard's IQ level according to the Texas Department of Corrections' records?

A Yes, sir.

Q Do you know how the Texas Department of Corrections would have obtained that information?

A They give them a test. I'm not sure exactly what kind of test, what they test them for.

Q Are you saying while Robert Tennard was in the [58] penitentiary, that the Texas Department of Corrections, as a matter of course, would have had administered a test to determine his IQ?

A That's my understanding of their procedure, sir.

Q Do you have possession of those records as his parole officer?

A Yes, sir.

Q And are those records public as a matter of law?

A No, sir.

Q Are you under a penalty of law to reveal or produce any of those records to anyone?

A No, sir. Well, I'm instructed by the Attorney General, on one hand, to do what the Judge says, and so what he says to do, what I have to reveal, I have to reveal.

Q All right, sir. And did you in fact bring a documentation of what Robert Tennard's intelligence quotient is according to the test from the penitentiary?

A Yes, I did.

Q And what was the result of that test?

A It's a 67, sir.

Q Thank you, sir.

MR. SCARDINO: I'll pass.

[59] CROSS EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q Do you have that document with you, sir?

A Yes, sir.

Q Could I examine it, if you would?

A Yes.

Q This is basically your record?

A Yes, sir.

Q The only record you have of that?

A Well, that's the copy of it. I have got the original of it at TDC.

Q What I'm asking, this is the only record that reflects the IQ; is that correct?

A Yes, sir.

(Whereupon State Exhibit No. 186 was marked for identification purposes by the court reporter.)

MR. CROWLEY: Your Honor, at this time we would offer into evidence State Exhibit 186 and tender to Defense counsel for his inspection.

MR. SCARDINO: No objections.

THE COURT: No objections, State Exhibit 186 is admitted into evidence.

Q Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?

[60] A No, sir.

Q It's basically just sort of, as it says, social and criminal history of the Defendant?

A Right, sir.

Q And it says, there's basically a line for IQ, and it says 67?

A That's correct.

Q And it has no indication of who may have given those tests or under what conditions?

A No, sir, it doesn't.

MR. CROWLEY: Pass the witness.

REDIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Well, Mr. Kinard, you get that information from the Texas Department of Corrections as a matter of course in your job, don't you?

A Yes, sir.

Q So you didn't administer the test, did you?

A No, sir.

Q You're his supervising parole officer, are you not?

A Correct.

Q And you get this information that would help you in determining how to supervise him as a parolee, don't you?

[61] A Well, it gives us some background information about him, sir.

MR. SCARDINO: Pass.

RECROSS EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q How long did you have Mr. Tennard under your supervision?

A He was released on the 25th of April, I believe, of '85, and I have had him since he got his present parole.

Q So it was about three-and-a-half months that he was on parole?

A Yes.

MR. CROWLEY: Pass the witness.

FURTHER REDIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Well, do your records show how long he was in the penitentiary?

A Yes, sir. I could go back and find that.

Q Well, let me refer you to the exhibit the prosecutor just got into evidence, Mr. Kinard. Look at what's marked as State Exhibit 186.

A Yes, sir.

[62] MR. SCARDINO: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Does it show the date that Mr. Tennard was placed in the penitentiary?

A Yes. He was sentenced on 3/10/1980.

Q And how many years did he get?

A Fifteen years, sir.

Q In fact, it shows when his sentence is to begin, does it not? Does it show a date?

A Correct.

Q What does it state?

A 8/7/79.

Q Would that show he was in jail from 8/7/79?

A Generally that's what it reflects.

Q So if he was supposed to have done something three or four years ago while he was out of the penitentiary, that would have been virtually impossible, wouldn't it?

A Well, sir, sometimes they get released on bond and then they're out on bond and then they commit another offense and then they get revoked off that bond. There's several ways that works.

Q Do your records show that he was continuously incarcerated from 8/7/79 until the release date that's indicated on this exhibit?

[63] A Yes, sir.

Q So you don't have any information other than he was placed in jail on August 7th, 1979, and was continuously there until about the third or fourth month of 1985?

A Fourth, month, you're right.

Q Does it show how old a man he was when he went into the penitentiary?

A It gives his date of birth. It has there 11/15/62.

Q It makes him 17 years old at that time?

A Yes, sir.

Q Does it indicate his age when he committed the rape that he went to the penitentiary for? Does it list his age at that time?

A Well, I would have to find out the date the offense was committed and then deduct it from that.

Q Your records don't indicate that he was 16 years old when that occurred?

A I have to go through there and look for it. I'm not sure.

Q Thank you, sir.

MR. SCARDINO: Pass.

MR. CROWLEY: No further questions, Your Honor.

THE COURT: May Mr. Kinard be [64] excused?

MR. CROWLEY: Yes, sir.

MR. SCARDINO: Yes, sir.

THE COURT: No objections, you may be excused.

(A recess.)

(Whereupon the jury was seated in the jury box.)

ERNEST PITCHER

was called as a witness by the Defense, and after having been first duly sworn, testified under his oath as follows:

THE COURT: The rule has been invoked, which you understand.

(Whereupon the following proceeding was held outside the presence of the jury.)

DIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q State your name.

A Ernest Pitcher.

Q How are you employed?

A I am employed with Ray Hardy, Harris County District Clerk's Office. I am assigned to the 351st Criminal District Court.

[65] MR. SCARDINO: Your Honor, for the record, the jury is not present and this is on the motion of the State to determine whether or not this witness' testimony would be admissible in front of the jury or not.

May I proceed based on that?

THE COURT: All right.

Q Were you the clerk in that court when Daniel Groom was tried before Judge Pruett?

A Yes.

Q And when was he tried?

A The trial proceeding began in May of this year, on the 29th, and continued until last month, which was September.

Q Was it tried to a jury?

A Yes.

Q What was the verdict?

A It was guilty of capital murder.

Q And did the jury assess the punishment?

A Yes, sir.

Q And what was the jury's verdict?

A Life in the penitentiary.

Q Mr. Pitcher, are you in possession of the Court's records as the clerk of that Court that would reflect the findings of the jury in that case?

[66] A Yes, sir.

Q And do your records also indicate that Daniel Groom had a co-defendant?

A Yes, sir.

Q And who was the co-defendant?

MR. ANDERSON: We'll stipulate it's Robert Tennard.

THE WITNESS: Yes.

MR. SCARDINO: Pass.

THE COURT: Any questions?

MR. ANDERSON: No questions, Judge.

MR. SCARDINO: Judge, if we could have the record reflect that we would offer this testimony before the jury, because the theory of the State's case and the case against Robert Tennard includes Daniel Groom, and that Daniel Groom's name has been mentioned numerous times before this jury. In fact, the previous trial of Daniel Groom has been mentioned numerous times before this jury. The State has relied on information of things that Daniel

Groom did and said in order to present this case to this jury. In fact, the Court has even charged this jury under the conspiracy theory that Daniel Groom and Robert Tennard acted together to cause the deaths of [67] Neblett and Smith. And for these reasons and in conjunction with the relaxed rules on capital murder punishment, we submit to the Court that it is probative to this jury to determine that Groom received a life sentence instead of a death sentence. I think it's something they have a right to know its determination of some of the facts and circumstances that have been at issue in this case that were determined by the other jury that would be probative of what's fair and just for Robert Tennard would be a determination of what another jury had done with Daniel Groom.

THE COURT: Does the State want to respond?

MR. CROWLEY: I would. While relaxed, the rules are not that relaxed, and basically there's a long line of authorities that errored [sic] to admit the results of co-defendants. Certainly in this case we would never argue that we would be allowed to at the guilt stage that that jury found Daniel Groom guilty, and that would be reversible error. And basically what he is asking the Court to do is allow evidence that would have no bearing on deliberations of this jury. They are to make up their minds from the evidence they have heard in the courtroom without regard to what happened in the co-defendant's case.

[68] MR. SCARDINO: If I may respond to that. The State is not promoting this testimony. I am. It would be reversible error, it would be like offering a piece of evidence that the Court has ruled is not admissible from

the State. I can still offer it into evidence as my submission of the evidence.

MR. CROWLEY: The Court of Criminal Appeals says a good rule of evidence works both ways.

MR. SCARDINO: Well, the Court knows I can offer it and knows it wouldn't be reversible error if I offer it.

THE COURT: I am going to sustain the State's objection. I believe it would be improper and perhaps influence the jury in this case, and I believe it would be proper for them to decide the issues based on the testimony and evidence they have in this case and not based upon what some other jury decides.

In light of my ruling, can we excuse Mr. Pitcher or do you need him for any other reason?

MR. SCARDINO: No, I believe the record reflects what his testimony would be if the Court would allow us to call him before the jury.

THE COURT: You will be excused.

[69] MR. SCARDINO: We would like to have the witnesses we have in the courtroom sworn. We would like to have them sworn in front of the jury.

THE COURT: All right. Bring the jury in.

(Whereupon the jury was seated in the jury box.)

MR. SCARDINO: We would like to have some witnesses sworn.

THE COURT: All witnesses who are called in the Robert James Tennard case will stand and raise your right hands and be sworn.

(Whereupon the witnesses were duly sworn.)

THE COURT: The rule has been invoked, which means you can't discuss your testimony amongst yourselves nor with the other witnesses or allow the other witnesses to discuss their testimony with you. You will all be excused to the hallway until you are called individually.

Defense will call your next witness.

MR. SCARDINO: Defense rests, Your Honor.

THE COURT: Defense rests.

MR. CROWLEY: State closes, Your [70] Honor.

MR. SCARDINO: Defense closes.

* * *

Closing arguments, *State of Texas v. Tennard*,
No. 431127, 248th District Court of
Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts
(trial transcript), 70-101]

* * *

[70] THE COURT: At this time, Mr. Anderson, you may proceed.

MR. ANDERSON: Ladies and gentlemen, I would like to preface my remarks, first of all, by first congratulating you on your verdict. You have done the proper thing in this case and it's not anything that any of you have taken lightly.

MR. SCARDINO: I object to the congratulating of the jury by the prosecutor on their [71] verdict as an endorsement of the verdict. We object to that.

THE COURT: Overruled.

MR. ANDERSON: And the reason for that, ladies and gentlemen, is that you have taken your oath very seriously. You have listened to the evidence, you have deliberated, and you have followed your oath and found this man guilty, as the evidence pointed, and I know you have taken that seriously and I know you will take this part of the trial seriously.

I am going to confine my remarks to special issue number one, which we talked to you about on voir dire, and, that is, whether or not this Defendant committed the act, that you have convicted him of, deliberately.

Before I get into that, I would just like to say a few things about my feelings on the overall evidence and the nature of this trial.

We heard Defense counsel talk about, it didn't matter whether someone was homosexual, black, white or otherwise, but then we heard reference to homosexuality about five times in his argument, and I hope you will follow your oath and the promise you made to me on voir dire, that these people – this is about other people and not anything else, not about where they're from, [72] how much money they have or what they do. It's about people, members of our community, former citizens of Harris County.

I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts. Look at what you promised us you'd look at, and remember you can't ever hear from Larry Neblett or Chester Smith again. They're not among us anymore, and that's what we're here about. They're human beings that are dead. They'll no longer be able to enjoy a nice day like today or a bad day or bad weather. They won't even have the experience of having a cold, something as simple as that, and that's been taken from them and it's been taken from them by this man here.

Now, our position at the outset has been clear. When we talked to you individually on voir dire, we told you there was no question that we were going to ask you to answer both of these special issues yes, because the evidence warrants that. Mr. Crowley will talk to you after

I'm through, and after Defense [73] counsel has their argument, about why the answer to special issue number two should be true.

Let me talk to you a little bit about special issue number one as it relates to the charge. The charge itself is not nearly as long or complicated as the charge that you took back on guilt/innocence. It's basically straightforward. It's a question of, do you feel the evidence shows and the State has proven beyond a reasonable doubt that, first of all, the conduct of the Defendant, Robert James Tennard, that caused the death of the deceased was committed deliberately. Remember the words we talked about on voir dire, "the reasonable expectation that the death of the deceased or another would result."

Now let me show you why the answer to that question should be yes based on the evidence. You remember we talked to you on voir dire in the hypothetical situation where a person goes into a bank and shoots a teller in the foot after he robs the teller to keep that teller from reaching the buzzer. He shoots the teller once in the foot and the teller bleeds to death.

There might be a question about deliberateness there, but remember we also said what about if a person goes in and puts the gun to the teller or the knife on [74] the teller and says, "Give me your money." The teller gets the money and realizes that they know one another, so he shoots the teller four times in the chest and kills him, because he says, "My God, I don't want to go back to the penitentiary. That person knows me. That person can give me up to the police. That person can sit in that witness stand and tell what happened."

And you remember we said, and you agreed, that that would be deliberate conduct.

Well, I submit to you that if nothing else in this case, the testimony of Dr. Espinola and the autopsy that he performed, State Exhibit No. 165, proves beyond any doubt that this was a deliberate act. The pathological diagnosis on the body of Larry Neblett, 10401 Onslow, Houston, Texas, autopsy report case No. 85-5002, performed August 18th, 1985:

"Lacerations of the scalp, (2)."

Those were not fatal, as you recall.

"Cutting wound of the scalp." That was not fatal.

"Stab wounds of the chest, (5)." Any of which would have been fatal.

"Stab wounds of the back, (10)." Two of which would have been fatal.

And I think Mr. Scardino said something fairly [75] interesting in his closing argument yesterday, talking about the fact that these could have been torture wounds. This man could have been torturing his victim, Larry Neblett, stabbing him shallow and then deeper and deeper and then deeper as the man struggled and tried to get away.

Now I apologize to you that we have got to introduce to you ugly pictures. I can't hardly stand to look at them, and I have seen a whole lot of them, and I know as citizens that have been brought in off the street from your jobs and your families, you don't see this kind of stuff very often.

MR. SCARDINO: I hate to object, but I have got to object to the reference of the other photographs that he has seen as not being in evidence and being improper argument.

THE COURT: Sustained. Don't refer to any that are not in evidence.

MR. SCARDINO: And we would ask the Court to instruct the jury to disregard the comment by the prosecutor.

THE COURT: Certainly disregard anything that's not in evidence, if it's any pictures that's not in evidence.

MR. SCARDINO: And we would ask [76] for mistrial.

THE COURT: And you are not to consider it for any purposes.

That will be denied.

MR. SCARDINO: Thank you.

MR. ANDERSON: And, again, it's never quit bothering me. It bothered me to look at these pictures, but I hope you will bear with me and realize it's necessary.

I want to make a point to you. First of all, if you'll take State Exhibit No. 159 back, you'll see the stab wounds to the left back of Larry Neblett. This was not accidental. It was not done in a fit of passion. These are cruel wounds inflicted to first hurt and then kill the victim. Again I apologize that this is the only way I can bring this to you, but here it is. And I ask you to look at it

when you go back there and consider the answer to special issue number one.

State Exhibit No. 161 shows the stab wounds to his chest, and I think you can see from the pattern of these stab wounds along with the pattern of the stab wounds to his back, that this man suffered, and these weren't wounds inflicted in self-defense by the Defendant. They were wounds to kill this man. One [77] would have killed him. Two would have killed him. Three would have killed him. And any of the seven that Dr. Espinola talked about would have killed him.

Why would somebody do something like that? Well, the State doesn't really have to show you why. We can't really go into somebody's mind and tell you what they're thinking at the time. We can only look at the facts and circumstances surrounding the actions of an individual, no matter how barbaric or how inhuman it is. And I think it's highly likely that this man killed Mr. Neblett because he knew, first of all, that Mr. Neblett would be able to testify against him and he knew he would be going back to the penitentiary and he knew that dead men tell no tales.

But through the pattern of the wounds on Mr. Neblett's body, it does tell you something. It tells you that it took him a long time to die and it tells you that he was incapacitated to where he couldn't chase anybody. These guys could have gotten away with his property. He was intoxicated. You know that. If they were just worried about getting the property and getting out, much like the individual who shoots the bank teller in the foot, they could have just held a knife on this man. He was intoxicated and he didn't have a weapon. They didn't stop there.

[78] They didn't stop there. They started stabbing, Mr. Tennard started stabbing and stabbing and stabbing and stabbing, and he stabbed this man fifteen times. And if you can come to any other conclusion that that was a deliberate act, then I apologize, because I made a vast error in judgment in putting you folks on the jury. Because I believe you are reasonable people and you promised me that you would use your common sense. And I don't see how you can come to any other conclusion but that this was a deliberate act.

Look at the weapon used. It's bent. Dr. Espinola said that could be from jabbing into hard bone. When Tennard couldn't find the mark, when he just missed placing it in between the ribs or in the man's soft part of his back.

The hatchet, that's self-explanatory.

The bottom line is, Mr. Tennard took a contributing member of our society, Larry Neblett, a human being who deserved to live and ought to be protected under the laws of our State, and turned him into a lifeless corpse after he had been invited into Mr. Neblett's home. I wish Mr. Neblett could be here to tell you exactly what happened, but by the evidence you've got, you can make that decision. You have got [79] plenty of evidence, and I submit to you that the only reasonable answer to special issue number one is yes: Yes, this was a deliberate act. When you stab a man in the back ten times and stab him in the chest five times, when, by gosh, you don't need to stab him at all if you're just trying to steal his property, then you have committed a deliberate act. You have deliberately taken his life. And you have gone even beyond that: You become almost an animal.

So I ask you folks just to review the evidence, please use your common sense and answer special issue number one as it should be answered. Thank you very much.

THE COURT: Mr. Scardino.

MR. SCARDINO: May it please the Court, prosecutors, ladies and gentlemen: That was a great final argument that Mike Anderson made to you. I thought it was touching and it was moving and it brought some things home. I could see you were interested in what he had to say and you listened to what he had to say. I could see you nodding your heads in agreement.

There's just one thing wrong with it: He's not a witness. He's a lawyer. He wasn't there. He obviously believes wholeheartedly everything Paul [80] Bogany told you. He had to accept it at full-face value. It convinced him or he wouldn't have gotten up here and told you what happened that night. Because he wasn't there. He is a prosecutor, and a real good one. You could tell by the way he handled himself and the way he argued his case with you. Why, you would have thought he was there the way he told you how it happened.

He forgot to mention to you that he had to believe Paul Bogany in order to tell you the story of what happened out there. And he took it all in at face value.

You don't have to do that. You can look at the testimony of Paul Bogany and you can accept some of it, like Judge Densen tells you, or you can accept all of it, like Mike Anderson just did, or none of it, or however many parts of it you want to accept in determining the answers to these two questions and whether this man lives or dies.

And I suspect that Sid Crowley is going to do the same thing. He's going to adopt Paul Bogany's statement, take it at face value as the gospel truth in interpreting what happened that night and how those two men got murdered. When they get up and make an eloquent argument to you like that, they have got to [81] adopt Mr. Paul Bogany's testimony.

Now it's a difficult time for you. It's the hardest part of a lawsuit. You've found my client guilty.

Remember, we're lawyers. What I say isn't any more testimony than what Mr. Anderson says. We're interpreting it for you. But we have all put in a lot of effort in this case, a lot of time, as you can see. You were brought in and out, but you don't see what we do when you're in here listening to testimony. You don't see all the work prior to trial, during the trial, at night and during the breaks. All the evidence that these prosecutors went out and gathered. There's a lot of evidence in this case. There were a lot of witnesses in this case. It took us almost two weeks to try this case. It took us months to pick the jury. It's as serious a matter as there is in this courthouse.

There's a lot of people here to watch it – the news, media, packed. All the citizens are in here and just can't wait to see what you folks do with Robert Tennard.

Well, there's not a whole lot here. They're probably upstairs watching the guy that's the Torch rather than a capital murder case. But I would like, [82] when you go back and decide the answers to these questions, you have a right to reconsider all the evidence. Remember they got up and said "We reoffer all the evidence, Judge," and I said, "So do I, and all the objections," and the Judge said, "Okay." Would you go back and look at it again in the light

of whether this man gets a life sentence or the death penalty? And give it some thought. Examine the evidence from the State's viewpoint. They're going to ask you to: Review what they have had to rely on and what they were able to gather up and bring in for you, what they did and didn't do, and my cross-examination of their witnesses and what it showed and what it didn't show. But please take that into consideration and think about it and mull it over before making your decision about the punishment of this man. Give it some thought and some time, because once you reach that verdict, that's it. No going back and changing anything.

Now I'm not going to get up here and preach to you. I'm going to try not to. Some may say I do. I am going to avoid that. And it's not my style to plead and beg. I'm not going to do that. But I would like for you to consider some things in deciding how to answer these questions.

Now what did the prosecution bring you besides [83] the testimony of a trial? What did they bring you on punishment? Well, they showed you that Tennard has been to the penitentiary for a bad case, a rape, and this poor lady that's sitting in the courtroom is the victim of it, and I'm sorry for her and there's nothing I can do about that. The law demands that the prosecution couldn't tell you about that during the guilt/innocence phase of the trial. They just couldn't do it. The law in Texas says they could let you know about it in the punishment phase, and that's what happened and that's what Judge Densen caused to happen. You were supposed to decide whether he's guilty or not based on the evidence they brought you, and now you can decide his punishment based on his prior criminal record, and that's what they brought you.

Now they brought you basically two witnesses or three witnesses, with the police officer, that said he arrested Tennard. They brought you Tracey Walker again, and I am puzzled by that. He said that Tennard stuck a gun in his face when he was drunk one night and told him he was going to blow his head off. Now, he said he had known Tennard for a long time, for nine years or more. Well, Tennard has been in the penitentiary for the last nine years, or, six, seven years, and he went when he was sixteen years old. So [84] how long could Tracy Walker have known him?

First of all, he lied to you. He said he did it about three years or so. It might have been longer. And on cross-examination, I tried to pin him down and he kept backing up: "Well, did it happen three years ago or six or seven years ago?" Well, you're supposed to accept that as helping you to decide whether or not Mr. Tennard lives or dies.

And this poor lady who was a victim of these three black youths, who kidnapped and raped her, I'm not going to tell you that was a bad case. It ought to make you mad. It makes me mad. I don't like it, but they tried to make more out of it than there was. They tried to show Tennard was the leader, that Tennard did this and Tennard did that. Well, clearly, clearly in cross-examination, he wasn't. It was bad, but he's not the first man, he's not the man that sodomized the lady. Well, he did sodomize her, but it wasn't three different ways; it was just two different ways. He was the second man, not the first man, and he clearly wasn't the leader who said "I'm going to turn you out and make you my old lady." It was Michael.

Who's the one who did time for it, who gets caught and serves time in the penitentiary for all three? Tennard. You didn't hear about the other two. [85] Where are they?

Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that Tennard has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.

Now special issue number one, in deciding that, you have got to apply the Court's instructions again. The Judge tells you a mandatory punishment for capital murder is death or confinement in the penitentiary for life. It tells you that the burden of proof is still on the State. It never shifts. So we don't have to prove or disprove anything. Each special [86] issue, that is, question one and question two, must be proved by the State beyond a reasonable doubt or you must not answer – he doesn't say this, but I am telling you, you must answer it no, unless they convince you beyond a reasonable doubt to answer it yes.

He goes on to tell you that if ten of you agree that the answer to one of the issues should be no, you are to then enter a verdict: No to that question. He tells you that if all twelve of you decide beyond a reasonable doubt that you're convinced the answer should be yes, then you have reached a verdict on that. So it's twelve for a yes and ten for a no on each issue.

Judge Densen goes on to tell you in his instructions that during your deliberations, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or the governor or how long the Defendant would be required to serve to satisfy a life sentence. In other words, you are to decide whether or not his sentence is a life sentence or a death sentence without looking beyond that.

Now what do you have to decide that? Special issue number one, the deliberate issue, we talked about that a lot on voir dire. What does deliberate mean? [87] What evidence is there to prove that Tennard deliberately took the life of Larry Neblett?

Now think about this: This isn't the kind of case where you have a witness that said "I saw him shoot him with the gun six times and I saw him walk over and put the gun to his head and blow his brains out." You don't have testimony like that. You don't have an eyewitness that saw the event that caused the death of the deceased.

You have got a witness, Paul Bogany, that says they went into separate rooms and he sees Neblett stagger to the door with some blood on him. We don't know how many times he's been stabbed now, but he says he sees him stagger to the door and then Groom comes up with his hatchet and whacked him in the head, and that was the

end of it. Didn't know how many times he had been stabbed at that point. And he says they started gathering things up and leaving, and then he says one of them says "That bitch done got up" or words to that effect, and then he says Groom and Tennard scramble back in there. He didn't see where they went or who was stabbed or who stabbed, so you don't really know, you don't have any direct testimony from anybody about who administered the fatal wounds to Mr. Neblett. You don't have that kind of testimony, so you're going to [88] have to guess who did that in answering special issue number one as to whether or not Robert Tennard deliberately caused the death of Larry Neblett.

Now think about that: If you answer that question yes, you're going to have to go home and think back through this trial when you have got plenty of time to think about it and you don't have the other jurors back there talking to you and trying to convince you one way or the other. When you get home, think about it, and the weeks and months to come, you are going to get to thinking about the evidence that the State has brought you to convince you beyond a reasonable doubt of whether or not it was in fact Tennard.

See, the law prevents us from knowing anything about Groom. We know there was a trial, and that's it. You heard testimony about that. So you don't get to hear anything about that. So in answering that question, you are going to have to make somewhat of a guess, because you don't have testimony of somebody that said, "I saw him take a life."

Now, the law demands that before a person can be executed, that you have got to have the kind of evidence

before you to convince you beyond a reasonable doubt that this is the man that caused his death. Not [89] guess.

Special issue number two, whether his actions would constitute a continuing threat to society, whether he would be a danger. This is what Mr. Crowley will talk to you about: Is there a probability that the Defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society beyond a reasonable doubt.

Now what evidence do you have of that? Well, Mr. Crowley is going to say, "Well, look, our position is, we believe Bogany and Stewart, and that he murdered Neblett and Smith, at least he was in there." Although nobody can testify they actually saw him raise a hand. And they'll say, "Look, when he was sixteen years old he kidnapped and raped this poor woman that's in the courtroom."

Now what other evidence do you have? Well, you can think about this: He is in an environment that prevents him from committing acts that would be a threat to society, or prevents him from committing acts that would be a continuing threat in the society that he's living in, like a penitentiary. You didn't hear any evidence and they have got the burden of proof and they had a right to bring you evidence of the time he spent in the penitentiary. I subpoenaed the parole [90] officer. They could have brought those records in here and showed them to you if there had been anything in there that had shown that he was anything other than a model prisoner when he was in the penitentiary, or they could have brought you the records of Harris County Jail where he's been for a year, since he was arrested, so you could see what kind of prisoner he was when he was right here. But there's been

no testimony about that. So you can take that into consideration in deciding the answer to special issue number two: Would he be a continuing threat to society if he was in the penitentiary?

Now the prosecutor, I suspect, will get up here and take these bloody pictures and wave them at you. He has a right to do that, and a good prosecutor would. And he'll try to get you to vote the way that he wants you to vote. But you remember that lawyers are advocates, that we take a position from the beginning of the case and we follow that through the case.

The prosecutor has taken the position of guilty and death, and he told you that in jury selection. And I'm taking a position, first of all, of not guilty and then not death. And then we promote those positions as best we can throughout the trial.

[91] Well, he's got something to work with. He's got bloody pictures, and they're bad. Mike Anderson is right, they're bad. And he's going to show them to you and he's going to talk about how poor Smith and Neblett aren't here to give you their version of what happened. And that may be unfortunate that they're not here, to have them somehow come back and tell you who actually did kill them and just how much of the truth Bogany was telling you. But they're not.

But remember the issue here today that you have influence on is not what happens to Smith and Neblett. You didn't have anything to do with making the decision of what happened to them. But you are here and you do have the power to make the decision of what happens to Robert Tennard. Don't let a good prosecutor that's a good public speaker get you revved up into the heat of the moment in

this trial to make a decision. Make your decision in a practical, detached way, by considering the evidence and looking at it in determining what it convinces you of or what it fails to convince you of.

Let me talk to you about capital murder for just a minute and what it means. I have tried a lot of capital murder cases and I have given it a lot of thought, and I am not here to tell you that I'm for or [92] against capital punishment. And we talked to you all about that on jury selection, whether you were or not, and all of you said you thought in a proper case you could give somebody the death penalty but that you would have to be awfully, awfully dead certain, convinced of it before you would. And I am asking you to stick to that statement now. Decide whether or not the person on trial in fact has met the legal burdens that Judge Densen has charged you with having to meet before you can cause his death.

We have had capital punishment in our society for as long back as we have had a society. In England they used to execute people on a daily basis for stealing from the King. It didn't stop people from stealing from the King because they had capital punishment on a daily basis. We adopted our system from the English and we had capital punishment after we formed our country.

If you remember back in the early days, they burned the witches in Salem and decided that was cruel and unusual punishment and that wasn't befitting of a modern society, so we quit burning witches. We used to hang people in the Old West. Finally we got law out there and quit doing that.

Texas had a law that said that if you were [93] convinced that somebody committed a death penalty offense,

they were executed by Old Sparky. Well, we decided that was cruel and inhuman and we abolished that. Now we kill people by lethal injection. That's the modern way to do it.

Well, I ask you when you go back in there and deliberate and you decide whether or not Robert Tennard lives or dies, you decide ten, fifteen years from now whether this exercise that we embarked upon would be a human and civilized procedure or not.

Now you're charged with acting as Robert Tennard's peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers. And I would ask you as you do that, as is your responsibility, you take into consideration the things that you have been informed of by me and by things the prosecutor has told you in judging Robert Tennard, and remember this: That when you go back there to decide whether you're convinced beyond a reasonable doubt, don't be influenced by a clever prosecutor's final argument of the testimony that's been presented to you. Remember [94] this: That if Robert Tennard goes to his death from this case, it will be based on the testimony of Fred Stewart and Paul Bogany. You think about that. That's what you're going to have to vote death on is on the testimony of those two men and adopt that, as the prosecutors have, in deciding what Robert Tennard's punishment is. And don't let Sid Crowley get up here and tell you to put blinders on and just answer the questions in a vacuum. The law allows you to take all the things into consideration that I talked to you about – attitude toward the death penalty,

take all these things into consideration, the 67 IQ – in deciding how you answer those questions. you have a right to do that under Texas law. Don't let Sid Crowley tell you you can't just look at the evidence and just answer the questions. You are allowed more latitude than that. Remember, what you do here will be forever lasting one way or the other. Remember, again, that it takes twelve of you to make a jury and not just one. When you're back there talking about the case, look at the jurors that are trying to get you to vote one way or the other and examine why they're doing that and what their motives are and what they want out of this case and analyze what you want to do based on what you've heard and what these other jurors heard and how [95] they interpret it and then you decide what you think the answer to these questions would be.

It's been a long trial and I appreciate everybody's patience and attention. Go back there and do what you have to do, but go back and do something that a month from now, when the heat of the moment is over, you won't regret. Thank you.

THE COURT: Mr. Crowley.

MR. CROWLEY: Ladies and gentlemen of the jury, at the outset, I would like to say that you have absolutely nothing to feel guilty about. The only person who is responsible for the situation that Robert Tennard now finds himself in is Robert Tennard.

There are some things about Mr. Scardino's argument that bothered me. He gave the argument of ten, twenty years ago or ten, twenty years from now will we still consider capital punishment human. Basically it seems to me a subtle argument to ask you to disregard the law. If

that is in fact the way citizens feel, it is their right to get their elected legislators to change that law. But each of you, when we questioned you on voir dire, and none of you relished the prospect of sitting on a case where it might be possible or in fact probable to return a verdict resulting in the death penalty, and I do not [96] take any real pleasure in presenting this type of case. It's a very serious, grave responsibility. But each of you said that if the evidence justified it in a proper case, that you could in fact answer both of those special issues yes.

Now I am not going to go back basically over the testimony that you heard over the last week and a half. That issue was resolved yesterday by your verdict.

I want to go back over some of that evidence as it relates to the Defendant's character, but also the evidence that you heard today. And I think after hearing Ms. Soto's testimony, you can see just what this Defendant is capable of; his character.

Special issue two asks, is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Scardino suggested that since the alternative is life imprisonment, he would be in a situation where he would not be a threat to society.

Ladies and gentlemen, I would suggest that concept, if the legislature in fact intended that, since the alternative will always be life, he would not be a threat, then the statute itself would be a [97] contradiction in terms – read that question carefully. The legislature did not frame it in terms of will he be a threat to other inmates, will he be a threat to other prisoners. It reads, is there a probability

that he would commit criminal acts of violence that would constitute a continuing threat to society. In other words, were he in society, is he the type of person that would commit those criminal acts that would constitute a menace. And, ladies and gentlemen, I think based upon the evidence, there is no other conclusion to answer but that he would.

Consider this: This Defendant is not yet 24 years old. His birthday is in November of 1962, yet in the past seven years he has managed to leave a trail of grief, victims and horror. He's had the opportunity to already serve seven years in the penitentiary, and you saw from the official records, he was out in less than three-and-a-half months before he graduated from the already very serious crime of rape to the ultimate of murder. The murder of Larry Neblett and Chester Smith. Mr. Scardino has told you that the Defendant has an IQ of 67. We heard no expert testimony from a psychologist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which [98] someone – we don't know who has – written in 67. But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

Look at the facts of the crime itself. you know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times.

Ladies and gentlemen, what did the other evidence show after the crime was completed? During the three days that he was at large, out trying to sell property, did he ever once express any remorse, any concern, for the two men laying dead in that house? No. The testimony showed that in fact his major concern was getting his fair share of the loot, not being cheated out of a few poultry [sic] dollars.

And what did they get out of this murder? A dilapidated stereo, some jewelry, and that was basically it. That's the price that Robert Tennard places on human life.

[99] You heard Valerie Soto testify. And it sets a pattern. Once again, Robert Tennard is the initiator, is the leader of the group.

What did he do that afternoon? It takes a special kind of person, a special kind of malevolence, if you will, to randomly abduct a citizen who's doing nothing more offensive than waiting for a bus to go to work, and he and three people took her for approximately five hours, raped her, threatened her with a wrench. He threatened to kill her. Remember, he threatened to kill Fred Stewart in the jail? The evidence just demonstrates this Defendant's utter callousness for the rights and regards and lives of other human beings. He has absolutely no concern or respect for his fellow citizens. He was so bold and brazen as to murder his neighbors that lived behind his house.

Again, as I remind you, he was in fact the leader. He was only sixteen years old, but had developed the type of character that would allow him to commit that kind of violent, serious crime.

Was he rehabilitated in prison? Obviously not. Because three-and-one-half months later, he went out and murdered Larry Neblett and Chester Smith.

Ladies and gentlemen, there's an equation that [100] we sometimes use, and it's the past versus the present equals the future. You have heard of his past, you have heard of his present. I would suggest that equals his future.

Again, look what he has managed to accomplish in less than 24 years of life. Valerie Soto has those horrible memories to live with. Evelyn Smith lost her brother Chester. James Neblett lost his son Larry, all at the hand of this Defendant.

Ladies and gentlemen, I am not going to wave bloody pictures around. I'm not going to rant and rave, because I think we're all too sophisticated for that and we all know what the law is asking you to do. The law is asking you to apply the evidence that you have heard to these two special issues and to answer them based upon that evidence. And I think, ladies and gentlemen, that based upon that evidence, you can reach no other conclusion but that, one, murder was committed deliberately and, two, that Robert Tennard would constitute a continuing threat to society.

I know it's not going to be an easy job and no one is going to enjoy it, but I am going to ask you to follow the law, as you took an oath to do, and to apply that evidence, and I believe that if you in fact follow that oath and apply the evidence, it will compel the [101] conclusion that there is no other possible answer than death to both special issues. Thank you.

* * *

State's Trial Exhibit 186, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

RESTRICTED
AND
CONFIDENTIAL

[SEAL]

TEXAS DEPARTMENT OF CORRECTIONS
Huntsville, Texas
SOCIAL AND CRIMINAL HISTORY

FIRST OFFENDER

Name: TENNARD, Robert James TDC #302700

True Name: TENNARD, Robert James

Interviewed: 4-2-80

Alias: TENNARD, Robert J. (AN#1) By: WC/dn

Date of Birth: 11-15-62 Age: 17

Medical Class: I

Soc. Sec. # Unk

E.A. 4.2 I.Q. 67

Segrative Class: I

Security Class: _____

Race: Negro Sex: Male

Court: 179th District

County: Harris

Offense(s): Rape (1)

Sentence: 15 years Sentenced: 3-10-80

To Begin: 8-7-79 Admitted: 3-18-80

Plea(s): Yes

Min. Expiration Date: 8-6-88

Max. Expiration Date: 8-7-94

Detainers: NO

(Number of Detainers – IBM Use Only)

Texas---------- _____ Federal-------- _____
O/States------- _____ Immigration-- _____

IBM CODES JOB CLASIFICATION:
_____ 1st Laborer _____
_____ 2nd _____
_____ 3rd _____
_____ Nativity: Houston, Harris Co., TX
_____ Citizenship: USA
_____ Residence (legal): Houston, Harris Co., TX
_____ Marital Status: Single
_____ Religion: Baptist
_____ Military Svc: None
_____ Co-defendants: Marvin Conway and one known only as "Doug"

PREVIOUS SENTENCE SUMARY:

	(Adult)	(Juv.)
Suspended Sentence-	—	—
Probation – (Fed.)-	—	—
Probation – (State)-	—	1

Det. Homes	1	Mil. Prison	—
Jails	1	T.D.C.	—
Reft'y.	—	O/Prisons	—

	Juv.	O/Inst.	T.D.C.	O/Pris.
Escapes	—	—	—	—
Attempted Escapes	—	—	—	—
Parole Violations	—	—	—	—

*DPS# 2710201 FBI# Unk

PRIOR TDC #

_____

Penalty Phase Jury Charge, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

CAUSE NO. 431127

THE STATE OF TEXAS	IN THE 248TH DISTRICT COURT
VS.	OF HARRIS COUNTY, TEXAS
ROBERT JAMES TENNARD	AUGUST TERM, A.D., 1986
	(Filed Oct. 7, 1986)

Members of the Jury:

By your verdict returned in this case you have found the defendant, Robert James Tennard, guilty of the offense of capital murder, which was alleged to have been committed on or about the 16th day of August, 1985, in Harris County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The Court instructs you further, however, as follows:

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes." If the jury unanimously

determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreperson will so record the Jury's answer to such issue by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue in the jury's deliberations.

If ten (10) jurors or more vote "No" as to any Special Issue, and only if ten (10) jurors or more vote "No," then the answer of the jury shall be "No" to that issue; and the Foreperson will so record the jury's answer by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if the jury returns an affirmative finding on each of the issues submitted, this court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

You are further instructed that in determining each of these Special Issues, you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

During your deliberations, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

During your deliberations upon the following Special Issues, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is now shown by the evidence.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ Woody R. Densen
Woody R. Densen, Judge
248th District Court
Harris County, TEXAS

Penalty Phase Verdict Forms, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

CAUSE NO. 431127

THE STATE OF TEXAS **VS.** **ROBERT JAMES TENNARD**	**IN THE 248TH DISTRICT COURT OF HARRIS COUNTY, TEXAS** **AUGUST TERM, A. D., 1986** (Filed Oct. 7, 1986)

The Special Issues, with forms for your answers, are as follow [sic]:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Virgil R. Faught, J.
Foreperson of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and detemine that the answer to this Special Issue is "No."

Foreperson of the Jury

THE STATE OF TEXAS	**IN THE 248TH DISTRICT COURT OF HARRIS COUNTY, TEXAS**
VS.	
ROBERT JAMES TENNARD	**AUGUST TERM, A. D., 1986**

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Virgil R. Faught, J.
Foreperson of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this

Special Issue, find and detemine [sic] that the answer to this Special Issue is "No."

Foreperson of the Jury

VERDICT

We, the Jury, return in open court the above answers to the Special Issues submitted to us, and the same is our verdict in this case.

/s/ Virgil R. Faught, J.
Foreperson of the Jury

Trial Court's Findings on State Habeas, *Ex parte Tennard*, No. 431127-A, 248th District Court of Harris County, Texas (February 18, 1993)

CAUSE NO. 431127-A

EX PARTE	§IN THE 248TH §DISTRICT COURT
ROBERT JAMES TENNARD, Applicant	§OF §HARRIS COUNTY, §TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Having considered the Petition for Writ of Habeas Corpus and the Respondent's Original Answer, the Court makes the following Findings of Fact and Conclusions of Law based upon the documents filed in said cause and the official court records:

FINDINGS OF FACT

1. The applicant, Robert James Tennard, was charged with, indicted for and convicted of the felony offense of capital murder. The jury affirmatively answered the special issues and the trial court assessed punishment at death.

2. The Court of Criminal Appeals affirmed the conviction in an opinion delivered November 28, 1990. **Tennard v. State**, 802 S.W.2d 678 (1990).

3. The Supreme Court of the United States denied the applicant's petition for writ of certiorari on June 28, 1991. **Tennard v. Texas**, ___ U.S. ___, 111 S.Ct. 2914 (1991).

4. Robert Scardino and Joe Licata represented the applicant at trial in the instant case.

5. During the applicant's trial, the applicant introduced, through the applicant's parole officer who testified from the applicant's parole sheet, evidence that the applicant's "IQ" was 67; the State then introduced the applicant's parole sheet into evidence (R. XXIX – 57-58, 59).

6. The Court finds that "IQ" stands for "Intelligence Quotient."

7. The Court finds that no evidence was presented to the jury regarding what an "IQ" means or what a "normal" IQ is.

8. The Court finds that no evidence was presented as to what an IQ of 67 meant to the applicant.

9. The Court finds that there was no evidence of when or where the IQ test was administered to the applicant or if more than one IQ test was administered to the applicant.

10. The Court finds that there was no evidence of the reliability of the result of 67.

11. The Court finds that there was no scientific or medical explanation of the applicant's IQ.

12. The Court finds that evidence of the applicant's "E.A." of 4.2 was submitted to the jury as a notation on a parole sheet.

13. The Court finds that there was no evidence of what "E.A." stood for or what effect an "E.A." of 4.2 had on the applicant.

14. During the applicant's trial, Thomas Landry, branch manager for Peakload, a temporary employment agency, testified that the applicant worked at the labor pool during the week of the murders (R. XVII – 1037-1039).

15. The Court finds, based on evidence presented during the applicant's trial, that the applicant effectively used the bus system of the City of Houston (R. XXI – 192).

16. During the applicant's trial, Frederick Stewart testified that, after he had pawned a ring stolen from the complainant, the applicant complained to co-defendant Groom, that they had sold a television for too little and that he would not let them sell the ring for too little also (XXI – 178-181).

17. The Court finds that the applicant's interest and ideas concerning the disposition of the stolen property showed a basic understanding of business and the value of items (R. XXI – 181, 232).

18. During the applicant's trial, Paul Bogany testified that the applicant told him that the complainant was wary of strangers so Bogany should stay outside until the applicant convinced the complainant that Bogany was an "okay guy" (R. XXII – 393); that the applicant told Bogany to put socks on his hands so no fingerprints would be left at the scene of the murders (XXII – 405-406); that the applicant had Bogany and Groom gather and dispose of all the items at the scene that they might have touched to

destroy evidence linking them to the scene (R. XXII – 412-413); and that the applicant was the person who gave directions to Bogany and Groom during the offense (R. XXI – 438-439).

19. The Court finds, based on evidence introduced at trial concerning the facts of the offense, that the applicant had a significant ability to reason. **See Finding No. 18.**

20. Gladys Alridge, a friend of the applicant and his aunt, testified that the applicant babysat his niece and nephew (R. XXVII – 1020-1021).

21. Based on the evidence that the D was allowed to babysit his niece and nephew, the Court finds that those who knew the applicant felt that he was capable of accepting responsibility.

22. The prosecutor argued that the jury should consider the applicant's "I.Q." if they felt that it was appropriate (R. XXIX – 72, 97-98).

23. The applicant's trial counsel argued that the jury should take the applicant's "I.Q." into consideration in answering the special issues (R. XXIX – 93-94).

24. The applicant filed seven pro se motions prior to his trial (R. I – 84-113).

25. The Court finds that the applicant's **pro se** filing of motions prior to trial illustrates the applicant's cognitive ability.

26. The Court finds that there was no evidence presented that the applicant was unable to learn from his mistakes.

27. The Court finds that there was no evidence presented that the applicant had organic brain damage.

28. The Court finds, *in the instant case*, that the evidence presented at trial regarding the applicant's "I.Q." was not the "two-edged sword" condemned in **Penry v. Texas**, ___ U.S. ___, 109 S.Ct. 2934 (1989).

29. The Court finds that the applicant was twenty-two years old at the time of the offense.

30. The Court finds, based on the testimony of the applicant's parole officer, that the applicant spent time in correctional facilities as a youth (R. XXIX – 62-63).

31. The Court finds that the State argued that the jury should not put a great deal of weight on the "mitigating" evidence presented on behalf of the applicant; the Court further finds that the State did not argue that the evidence should not or could not be considered.

CONCLUSIONS OF LAW

1. The introduction into evidence of the notations of "I.Q. – 67" and "E.A. – 4.2," without further explanation, is insufficient to require a "**Penry**" instruction.

2. In light of the applicant's ability to work, to function as an individual in society, to file **pro se** motions, and to comprehend the process of ridding himself of stolen goods in exchange for money, the applicant's bare evidence of an IQ of 67 and an E.A. of 4.2 does not rise to the level of **Penry** evidence because Penry demonstrated a chronic disability to learn from his mistakes. **See and Cf. Ex parte Goodman**, 816 S.W.2d 383, 385-386 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered Goodman's IQ of 56,

intellectual level of an eight or nine year old and his possible brain damage in holding that a **Penry** instruction was necessary); **Ex parte McGee**, 817 S.W.2d 77 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered McGee's mental retardation, trauma to the brain at birth, IQ of 66, and that he did not have the ability to transfer information from one learning situation to another in holding that a **Penry** instruction was necessary); **Ramierez v. State**, 815 S.W.2d 636 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered Ramierez's IQ of 57, his physical abuse at the hands of his father, and testimony of the doctor who performed the psychological evaluation in holding a **Penry** instruction was necessary).

3. The evidence of the applicant's "I.Q.", "E.A." and age was fully able to be considered under the special issues presented to the jury in the punishment stage of trial without an additional instruction.

4. The applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require an evidentiary hearing.

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 431127-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 431127-A, including his Petition for Writ of Habeas Corpus;

2. the Respondent's Original Amended Answer in cause number 431127-A;

3. this Court's findings of fact, conclusions of law and order denying relief;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent;

6. [sic] the indictment, judgment, sentence, docket sheet, and appellate record in cause number 431127, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Mandy Welch and Anthony Haughton, Texas Resource Center, 3223 Smith Street, Suite 215, Houston, Texas 77006, and to Respondent: C. Kari Sckerl; 201 Fannin; Houston, Texas 77002-1901.

SIGNED this ___ day of Feb. 18, 1993.

/s/ W. Densen
JUDGE PRESIDING

Opinion on State Habeas, Texas Court of Criminal Appeals, *Ex parte Tennard*, 960 S.W.2d 57 (Tex.Crim.App. 1997)

Court of Criminal Appeals of Texas, En Banc.

Ex parte Robert James TENNARD.

No. 71678.

Dec. 18, 1997.

Elizabeth Cohen, Austin, for appellant.

Kari Sckerl, Asst. Dist. Atty., Houston, Matthew Paul, State's Atty., Austin, for State.

Before the court en banc.

OPINION

McCORMICK, Presiding Judge.

This is a post conviction application for writ of habeas corpus filed pursuant to Article 11.07, V.A.C.C.P. We will deny relief.

In October 1986, a jury convicted applicant of capital murder, and sentenced him to die. This Court affirmed applicant's conviction and sentence on direct appeal. *Tennard v. State,* 802 S.W.2d 678 (Tex.Cr.App.1990). The United States Supreme Court denied applicant's petition for writ of certiorari on June 28, 1991. *Tennard v. Texas,* 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1077 (1991).

In this proceeding, applicant claims the Texas capital sentencing scheme applicable to his case[1] was applied to him in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He argues the special issues failed to provide his jury a vehicle to give mitigating effect to "relevant mitigating evidence" of his youth, "youthful incarceration" and what he claims is evidence of his mental retardation, all in violation of *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Viewed in the light most favorable to the verdict, the evidence shows applicant and two others brutally murdered two men in their home during a robbery. See *Tennard,* 802 S.W.2d at 679. Applicant lived behind the home of the victims, and he knew them. The victims had invited applicant and his two friends into their home approximately fifteen to thirty minutes before they were attacked. Applicant stabbed one of the victims fifteen times with a knife while one of applicant's friends killed the other victim with a hatchet. Applicant played a dominant role in disposing of the victims' stolen property. Applicant presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders.

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[1] See Article 37.071(b)(1) and (2), V.A.C.C.P., (requiring the submission of two special issues to the jury: (1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and (2) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

The evidence from the punishment hearing shows applicant had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified applicant and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, applicant, who was displaying about a foot-and-a-half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."

The victim testified applicant and his friends took her to an abandoned apartment at some government project where applicant forced her to engage in oral, vaginal and anal sex with him. After that, applicant's two friends took turns sexually assaulting her.

Applicant and his friends then took the victim to another house where applicant began using drugs and discussing "pimping out" the victim. She asked applicant if she could go to the bathroom to take a bath, which he allowed her to do:

> "Q. Now you told them that you wanted to take a bath?
>
> "A. Yes, I did.
>
> "Q. Did [applicant] say anything?
>
> "A. He told me I wasn't going to try to run away, was I.
>
> "Q. What did you tell him?
>
> "A. I told him, 'No, baby. I like you. I wouldn't do that.'"

After applicant let the victim go to the bathroom, she escaped through a window, and applicant was arrested later that day. The victim testified applicant appeared to

be the leader during her ordeal. Applicant impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of applicant's friends was the leader.

Applicant's parole officer testified that a Texas Department of Correction's (TDC) record from applicant's incarceration for the rape conviction indicated he had a 67 IQ.

> "Q. . . . And did you in fact bring a documentation of what [applicant's] intelligence quotient is according to the test from the penitentiary?
>
> "A. Yes, I did.
>
> "Q. And what was the result of the test?
>
> "A. It's a 67, sir."

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before applicant committed this offense, and there is a notation on the record indicating applicant had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

> "Q. Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?
>
> "A. No, sir.
>
> "Q. It's basically just sort of, as its says, social and criminal history of [applicant]?
>
> "A. Right, sir.
>
> "Q. And it says, there's basically a line for IQ, and it says 67?

> "A. That's correct.
>
> "Q. And it has no indication of who may have given those tests or under what conditions?
>
> "A. No sir, it doesn't."

This is *all* the evidence presented at applicant's 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. Applicant also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

During closing arguments at the punishment phase, the prosecutor argued the facts of the crime itself showed applicant's "special dedication to violence."

> "Look at the facts of the crime itself. You know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times."

Applicant referred to the IQ evidence twice during closing arguments at punishment. He referred to the evidence in responding to portions of the rape victim's testimony:

> " . . . the information that they gave is that [appellant] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, 'Well, if I let you in there, will you leave?' And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got

> a man before us that has got an intelligence quotient before us that is that low."

And, he asked the jury to take into account the IQ evidence in answering the special issues:

> " . . . none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers."

Evidence of Youth and Previous Incarceration

Applicant argues the special issues failed to provide the jury a vehicle to give mitigating effect to evidence of his youth and evidence that he spent most of his formative years incarcerated. We disagree.

This Court and the United States Supreme Court have held the special issues allow the fact finder to give mitigating effect to evidence of a defendant's youth and good prison record. See *Johnson v. Texas,* 509 U.S. 350, 367-69, 113 S.Ct. 2658, 2669, 125 L.Ed.2d 290 (1993); *Jones v. State,* 843 S.W.2d 487, 497 (Tex.Cr.App.1992), *cert. denied,* 507 U.S. 1035, 113 S.Ct. 1858, 123 L.Ed.2d 479 (1993); *Ex parte Harris,* 825 S.W.2d 120, 122 (Tex.Cr.App.1991). And, we have held the special issues allow the fact finder to consider and give mitigating effect to evidence of a troubled or abusive childhood. *See Ex parte Jacobs,* 843 S.W.2d 517, 520 (Tex.Cr.App.1992); *Goss v. State,* 826 S.W.2d 162, 166 (Tex.Cr.App.1992); *Lewis v. State,* 815 S.W.2d 560, 567 (Tex.Cr.App.1991).

Since the special issues allow the fact finder to give mitigating effect to this kind of evidence, they also allow the fact finder to consider and give mitigating effect to any

mitigating qualities of evidence of "youthful incarceration." In any event, applicant has not established any "nexus" between his "youthful incarceration" and the "circumstances of the offense which tend[s] to excuse or explain the commission of this offense." *See,* e.g., *Earhart v. State,* 877 S.W.2d 759, 765 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 966, 115 S.Ct. 431, 130 L.Ed.2d 344 (1994). And, the proposition that evidence of "youthful incarceration" possesses any mitigating qualities is almost absurd. We hold the special issues provided the jury a vehicle to give effect to any mitigating qualities of the evidence of applicant's youth and "youthful incarceration."

Mental Retardation

Applicant also claims the special issues failed to provide the jury a vehicle to give mitigating effect to evidence of his "mental retardation." He claims this Court should "reaffirm its bright-line rule" that "'evidence of mental retardation falls beyond the scope of the [former] statutory special issues.'" *See,* e.g., *Earhart,* 877 S.W.2d at 765. The first question we must ask is whether there is any evidence that applicant is mentally retarded. Applicant would have this Court hold under *Penry* that a five-year-old reference in an obscure TDC record to applicant's IQ score of 67 shows applicant is mentally retarded, and that evidence of an IQ of 70 or less is sufficient evidence to support a finding of mental retardation. We decline to do so.

According to the American Association on Mental Retardation (AAMR), a person is considered to be mentally retarded *only* when there is evidence of: (1) subaverage general intellectual functioning, (2) concurrent deficits in

adaptive behavior, *and* (3) onset during the early development period. See David L. Rumley, Comment: *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty,* 24 St. Mary's Law Journal Number 4 1299, 1312-14 (1993). Texas has adopted the AAMR three-part definition of mental retardation in the "Persons With Mental Retardation Act." See V.T.C.A., Health & Safety Code, Section 591.003(13) ("mental retardation" means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period); V.T.C.A., Health & Safety Code, Section 591.003(16) ("person with mental retardation" means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior). And, *Penry* also expressly relies on the AAMR three-part definition of mental retardation.

> "Persons who are mentally retarded are described as having 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.' American Association on Mental Deficiency (now Retardation) (AAMR), Classification in Mental Retardation 1 (H. Grossman ed.1983). To be classified as mentally retarded, a person generally must have an IQ of 70 or below. (Citation Omitted). Under the AAMR classification system, individuals with IQ scores between 50-55 and 70 have 'mild' retardation. Individuals with scores between 35-40 and 50-55 have 'moderate' retardation. 'Severely' retarded people have IQ scores between 20-25 and 35-40, and 'profoundly' retarded people have scores below 20 or 25. (Citation Omitted).

> Approximately 89% of retarded persons are 'mildly' retarded. (Citation Omitted). *Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1."

The first part of the AAMR test is measured by IQ, and an individual must have an IQ test score of 70 or less to meet the first part of the AAMR definition of mental retardation. See 24 St. Mary's Law Journal Number 4 at 1316-17. However, that does not end the inquiry or mean that everyone with an IQ of 70 or below is mentally retarded; it means only that all mentally retarded persons have an IQ of 70 or below. Because of their unreliability in determining mental retardation, IQ scores should not be used as a "unitary measure of mental retardation;" a low IQ alone does not provide a justifiable basis for classifying a person as mentally retarded. See *id.* at 1329-35.

And, some argue that using IQ scores as the sole measure of mental retardation could have negative social consequences for all persons with low IQ scores who are "perfectly capable of a self-sustaining life." See *id.* at 1338-40. They argue this could present a potential danger to the liberty of these citizens. See *id.*

The second part of the AAMR definition of mental retardation is not quantifiable; it measures a person's ability to function properly in society such as, for example, meeting the needs of day to day life. See *id.* at 1317-20. And, the third part of the AAMR definition requires a person to exhibit parts one and two of the AAMR definition during his developmental period. See *id.* Once the three-part AAMR definition is met, IQ score ranges are utilized to measure the severity of mental retardation ranging from "mild" to "profound." See *id.* at 1321; *see also Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1.

Based on the foregoing, it arguably is clear that Johnny Paul Penry's evidence met the AAMR three-part definition of mental retardation and Section 591.003(13) of the Health and Safety Code. See *Penry,* 492 U.S. at 307-311, 109 S.Ct. at 2941-42. However, it is clear that applicant's evidence of a low IQ score, standing alone, does not meet this definition. Qualitatively and quantitatively applicant's low IQ evidence does not approach the level of Johnny Paul Penry's evidence of mental retardation. Based on the foregoing, we find no evidence in this record that applicant is mentally retarded.

Assuming the evidence of applicant's low IQ somehow falls within *Penry's* definition of mental retardation,[2] we still hold applicant is not entitled to relief under *Penry.* United States Supreme Court decisions before and after *Penry* have upheld the constitutionality of Texas' former special issues framework because this framework has allowed juries in the vast majority of cases to consider and give effect to relevant mitigating evidence in a meaningful manner. See *Johnson,* 509 U.S. at 361-67, 113 S.Ct. at 2666-68; *Graham v. Collins,* 506 U.S. 461, 473-75, 113 S.Ct. 892, 901, 122 L.Ed.2d 260 (1993); *Franklin v. Lynaugh,* 487 U.S. 164, 181-82, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Johnson* reaffirmed that as long as relevant mitigating evidence is within "the effective reach of the sentencer" the requirements of the Eighth Amendment are satisfied. *Johnson,* 509 U.S. at 367-69, 113 S.Ct. at 2669 (distinguishing *Penry* because special

[2] See *Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1.

issue two provided the jury a meaningful basis to consider and give effect to the mitigating qualities of Johnson's youth). All the Constitution requires is that a jury be able to consider in some manner a defendant's relevant mitigating evidence. See *id.* The Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." See *id.*

The issue in cases like this is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence.'" See *Johnson,* 509 U.S. at 367-71, 113 S.Ct. at 2669-70. We should evaluate the instructions with a "'commonsense understanding of the instructions in the light of all that has taken place at trial.'" *See Johnson,* 509 U.S. at 367-69, 113 S.Ct. at 2669. This involves a case-by-case approach requiring a consideration of the specific facts of each case. And, this is the approach the Supreme Court followed in *Penry. See Penry,* 492 U.S. at 307-14, 320-330, 109 S.Ct. at 2941-44, 2948-2952. There are no bright-line rules in cases like this.

In *Penry,* Johnny Paul Penry presented evidence that his mental retardation made it impossible for him at the time of the offense to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *Penry,* 492 U.S. at 307-09, 320-30, 109 S.Ct. at 2941, 2949; see also *Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667 (evidence suggested that Penry's mental retardation *rendered him unable to learn from his mistakes*); *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901 (Court considered Penry's evidence to be mitigating because *it diminished Penry's*

ability to control his impulses or to evaluate the consequences of his conduct). Johnny Paul Penry's evidence was relevant mitigating evidence because the Supreme Court identified a long-held belief by society "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry,* 492 U.S. at 318-20, 109 S.Ct. at 2947; see also *Johnson,* 509 U.S. at 369-71, 113 S.Ct. at 2670.

However, the special issues placed the mitigating qualities of Johnny Paul Penry's evidence beyond the effective reach of the jury because it could not be determined for sure whether the jury could have given "appropriate" mitigating effect to the evidence in answering special issue one. See *Johnson,* 509 U.S. at 363-65, 369-71, 113 S.Ct. at 2667, 2770. More importantly, the jury could have given Johnny Paul Penry's evidence *only* aggravating effect in answering special issue two. *See Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667 (Penry's mitigating evidence was relevant to the second special issue *only* as an aggravating factor because it suggested a "yes" answer to that special issue); *Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949. Johnny Paul Penry was entitled to relief not because of his mental retardation standing alone, but because the special issues placed beyond the effective reach of the jury the mitigating qualities of Penry's evidence that his mental retardation rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense. *See also Johnson,* 509 U.S. at 363-65, 367-71, 113 S.Ct. at 2667, 2669-70; *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901; *Penry,* 492 U.S. at 307-09, 322-24, 335-39, 109 S.Ct. at 2941, 2949, 2956-57 (in light of the

diverse capacities and life experiences of mentally retarded people, it cannot be said that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty).

Here, there is no evidence applicant's low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct. *See Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667; *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901. Therefore, there was no danger, as in *Penry,* that the jury would have given any mitigating qualities of the evidence of applicant's low IQ *only* aggravating effect in answering special issue two. *See Johnson,* 509 U.S. at 363-65, 369-71, 113 S.Ct. at 2667, 2669-70; *Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949.

In addition, the special issues did not place mitigating qualities of the evidence of applicant's low IQ beyond the effective reach of the jury. The jury could have used this evidence for a "no" answer to the first special issue on "deliberateness." *See Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949. Moreover, in considering the circumstances of this offense and applicant's prior felony rape conviction in connection with special issue two, the jury could have used the low IQ evidence to conclude applicant was a "follower" instead of a "leader" since he participated in the commission of both crimes with others. *See,* e.g., *Ellason v. State,* 815 S.W.2d 656, 660 (Tex.Cr.App.1991) (one factor to consider in determining whether the evidence is sufficient to support an affirmative answer to special issue two is whether the defendant was acting under duress or the domination of another at the time of the offense); see also

Johnson, 509 U.S. at 371-73, 113 S.Ct. at 2671. There was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low IQ evidence.

All requested relief is denied.

OVERSTREET and WOMACK, JJ., dissent.

MEYERS, Judge, concurring.

Applicant contends the jury that sentenced him to death was unable to consider and give mitigating effect to evidence of his mental retardation, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[1] *See Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Applicant is not entitled to relief because the record does not contain sufficient evidence to support his claim.

I

In 1972, the Supreme Court held that the imposition of the death penalty in Texas for the offense of rape

[1] Appellant also claims the jury was unable to consider and give mitigating effect to evidence of his youth and youthful incarceration. Both this Court and the Supreme Court have rejected claims that evidence of youth and good prison record requires an additional jury instruction. *See, e.g., Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (youth); *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (good prison disciplinary record); *Jones v. State,* 843 S.W.2d 487, 497 (Tex.Crim.App.1992) (good behavior in prison), *cert. denied,* 507 U.S. 1035, 113 S.Ct. 1858, 123 L.Ed.2d 479 (1993); *Ex parte Jacobs,* 843 S.W.2d at 520 (education during prison); *Ex parte Harris,* 825 S.W.2d at 122 (youth).

violated the Eighth and Fourteenth Amendments to the United States Constitution.[2] Subsequently, the Texas legislature narrowed the scope of death penalty crimes to murder committed in specified circumstances, and required the jury to answer special issues regarding deliberateness, future dangerousness, and in some instances, provocation. *Jurek v. Texas,* 428 U.S. 262, 268-69, 96 S.Ct. 2950, 2954-55, 49 L.Ed.2d 929 (1976). In a plurality opinion, the Supreme Court upheld the new Texas death penalty scheme as facially constitutional, in part, because the special issues permitted the jury's *consideration* of mitigating factors. *Id.* at 272-74, 276, 96 S.Ct. at 2956-57, 2958. Not only must the defendant be allowed to present mitigating evidence to the jury, but the jury "must also be able to consider and give effect to that evidence in imposing [its] sentence." *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947 (citing *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)).

In 1989, that Court held that the special issues of article 37.071(b) were unconstitutional as applied to Johnny Paul Penry because they did not provide the jury with a vehicle in which to give full mitigating effect to evidence of Penry's mental retardation, arrested development, and background of childhood abuse. *Penry.* At Penry's trial, a psychiatrist testified "that Penry suffered

[2] *Branch v. Texas,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was decided in conjunction with *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Also decided with *Furman* was *Jackson v. Georgia.* In *Branch* and *Jackson,* the defendants were assessed the death penalty for committing rape; in *Furman,* the defendant was assessed the death penalty for committing murder.

from organic brain damage and moderate [mental] retardation, which resulted in poor impulse control and an inability to learn from experience," *id.* at 308, 109 S.Ct. at 2941, and that the organic brain disorder was probably caused at birth, but could have been the result of early childhood beatings. *Id.* at 308-309, 109 S.Ct. at 2941-42. Penry's sister testified that their mother frequently beat Penry with a belt over the head when he was a child, and that he was regularly locked in his room for long periods without access to a toilet. *Id.* at 309, 109 S.Ct. at 2941-42. The State presented rebuttal testimony from two psychiatrists who testified that Penry was not suffering from a mental defect at the time of the offense; however, the two psychiatrists also testified that Penry was unable to learn from experience. *Id.* 309-10, 109 S.Ct. at 2941-42.

The Supreme Court noted that evidence of Penry's mental retardation, arrested development, and abused background had "relevance to his moral culpability beyond the scope of the special issues," and that the jury could not consider and give mitigating effect to that evidence absent an additional jury instruction. *Id.* at 322, 109 S.Ct. at 2948-49. Further, Penry's evidence was considered to be double-edged under the second special issue in that it simultaneously diminished blameworthiness for the crime, but also indicated a probability of future dangerousness, *id.* at 324, 109 S.Ct. at 2949-50, and that the jury could only give aggravating effect to that evidence. *Id.* at 323, 109 S.Ct. at 2949. Thus, an additional instruction was mandated, one "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Id.* at 328, 109 S.Ct. at 2951-52.

Following *Penry,* this Court has been presented with numerous claims from other defendants sentenced to death asserting that absent a "*Penry* instruction," their sentencing juries could not and did not give mitigating effect to such evidence as, for example, alcoholism/drug abuse, troubled background, and certain types of mental illness. In cases too numerous to mention, this Court has rejected such claims as not falling within the *Penry* rule. *See, e.g., Robison v. State,* 888 S.W.2d 473 (Tex.Crim.App.) (childhood sexual abuse, schizophrenia, drug abuse, and remorse), *cert. denied,* 515 U.S. 1162, 115 S.Ct. 2617, 132 L.Ed.2d 859 (1995); *Mines v. State,* 852 S.W.2d 941 (Tex.Crim.App.1992) (insanity and manic depression), *vacated,* 510 U.S. 802, 114 S.Ct. 42, 126 L.Ed.2d 13 (1993);[3] *Ex parte Jacobs,* 843 S.W.2d 517 (Tex.Crim.App.1992) (troubled background, cooperation with police, remorse, and positive character traits), *cert. denied,* 509 U.S. 926, 113 S.Ct. 3046, 125 L.Ed.2d 731 (1993); *Ex parte Harris,* 825 S.W.2d 120 (Tex.Crim.App.1991) (circumstances of offense, remorse, cooperation with police, youth, and alcoholism). With one exception,[4] this Court has sustained a *Penry*

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[3] The Supreme Court vacated our judgment and remanded *Mines* to us in light of *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

[4] *Gribble v. State,* 808 S.W.2d 65, 75-76 (Tex.Crim.App.1990), *cert. denied,* 501 U.S. 1232, 111 S.Ct. 2856, 115 L.Ed.2d 1023 (1991). In *Gribble,* the defendant was sentenced to death for murder during the course of a kidnapping. Gribble claimed he had consensual sex with the deceased. Gribble presented evidence of a troubled childhood. Gribble's mother was institutionalized for mental illness and his father for burglary. Further, Gribble's mother sexually abused him when he was a small child. A psychoanalyst testified that those experiences, even if delusional, indicated the same mental illness as suffered by Gribble's mother, and that throughout his adult life, Gribble suffered from a

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claim *only* when there is evidence of mental retardation. *See Rios v. State,* 846 S.W.2d 310, 315 (Tex.Crim.App.1992), *cert. denied,* 507 U.S. 1051, 113 S.Ct. 1946, 123 L.Ed.2d 651 (1993); *Richard v. State,* 842 S.W.2d 279, 280-83 (Tex.Crim.App.1992); *Ex parte Williams,* 833 S.W.2d 150 (Tex.Crim.App.1992); *Ex parte McGee,* 817 S.W.2d 77 (Tex.Crim.App.1991); *Ex parte Goodman,* 816 S.W.2d 383 (Tex.Crim.App.1991); *Ramirez v. State,* 815 S.W.2d 636, 655-56 (Tex.Crim.App.1991). But even in those cases, the evidence of mental retardation was always something more than what was presented in this case.

II

The American Psychiatric Association (APA) has stated that the essential feature of mental retardation is "significantly subaverage general intellectual functioning"

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delusional fear of sexual domination which resulted in violence towards women. This Court held that under *Penry,* Gribble was entitled to an additional jury instruction.

In a case in a category by itself, this Court held the third special issue of article 37.071(b) was unconstitutional as applied. *First v. State,* 846 S.W.2d 836, 837-42 (Tex.Crim.App.1992). In *First,* the defendant was sentenced to death for murdering more than one person in the same criminal transaction. First and three acquaintances were leaving a bar when one of them attacked First and repeatedly slammed his head onto the sidewalk. When the attacker attempted to flee with one of the other acquaintances, First shot them. First's attacker was not the first named victim in the indictment. Since article 37.071(f) precluded the jury from considering the provocation of any other deceased besides that of the first named in the indictment, we held that the third special issue was unconstitutional as applied to First because the jury could not give mitigating effect to evidence of provocation on the part of First's attacker.

accompanied by "significant limitations in adaptive functioning," the onset of which must occur before age 18. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39 & 46 (4th ed. rev.1994) (hereinafter *DSM-IV*); *see also* American Association on Mental Deficiency (AAMD), *Classification in Mental Retardation* 1 (Herbert J. Grossman ed.1983) (hereinafter AAMD) ("Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"). While dementia shares characteristics with mental retardation, its onset may occur after age eighteen. *DSM-IV* at 45, 137, 139.[5] However, for *Penry* purposes, courts should not distinguish between mental retardation and dementia. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L.Rev. 414, 422-23 (1985).

"General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered general intelligence tests (e.g., Weschler Intelligence Scales for Children – Revised, Stanford Binet, Kaufman Assessment Battery for Children)." *DSM-IV* at 39. "Significantly subaverage

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[5] According to the APA: The essential feature of a dementia is the development of multiple cognitive deficits that include memory impairment and at least one of the following cognitive disturbances: aphasia, apraxia, agnosia, or a disturbance in executive functioning. The cognitive deficits must be sufficiently severe to cause impairment in occupational or social functioning and must represent a decline from a previously higher level of functioning.

DSM-IV at 135.

intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." *Id.*; *see also* AAMD at 1. Professionals are flexible in their clinical assessments of mental retardation, sometimes determining that someone with an IQ of above 70 is mentally retarded or that someone with an IQ of below 70 is not mentally retarded. AAMD at 23. IQ tests differ in content and in the way they measure IQ. *Id.* at 56-57; *see Ex parte Williams,* 833 S.W.2d at 152. Therefore, it is important to know which test was administered in determining what an IQ score represents.

"Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her[6] age level and cultural group, as determined by clinical assessment and, usually, standardized scales." AAMD at 11. Such standardized methods of measuring an individual's adaptive functioning or behavior include the Vineland Adaptive Behavior Scales and the AAMD Adaptive Behavior Scale. *DSM-IV* at 40. A determination of adaptive functioning may also be made by teacher evaluation and educational, developmental, and medical history. *Id.* Thus, an individual should not be classified as mentally retarded unless he is deficient in

[6] Mental Retardation is more common among men than women. *Id.* at 44.

both intellectual functioning, as indicated by IQ, and in adaptive behavior.[7]

In the instant case, applicant's parole officer testified at punishment that applicant's parole record reflected that his IQ was 67. He testified that when applicant was incarcerated for a previous offense, the Texas Department of Corrections administered to applicant a test to determine his IQ, but the parole officer was "not sure exactly what kind of test, what they test them for." The parole officer further testified that applicant's parole record did not purport to be a psychologist's report, rather it was a

[7] In the Persons with Mental Retardation Act, the Texas legislature has adopted definitions similar to the AAMD and the APA regarding mental retardation:

> "Adaptive behavior" means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
>
> * * *
>
> "Mental retardation" means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.
>
> * * *
>
> "Persons with mental retardation" means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior.
>
> * * *
>
> "Subaverage general intellectual functioning" refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used. Tex. Health & Safety Code Ann. § 591.003(1), (13), (16) & (20) (Vernon 1994).

record of applicant's criminal and social history. The parole officer acknowledged that the parole record did not indicate by whom or under what circumstances the test was administered.

During closing arguments, the prosecutor told the jury:

> I'm sure the Defense is going to ask you to forgive [applicant] for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts.

Defense Counsel remarked:

> Then I called a witness who testified he's [applicant's] parole officer. Uncontroverted evidence that when [applicant] was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that [applicant] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have.[8]

[8] At punishment, a woman testified regarding an extraneous offense in which applicant and two men drove up to her while she was waiting for a bus to take her to work and forced her into their car. The men drove her to a vacant apartment where they took turns sexually

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> That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.
>
> * * *
>
> Now you're charged with acting as [applicant's] peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ.

The prosecutor responded:

> [Defense Counsel] has told you that [applicant] has an IQ of 67. We heard no expert testimony from a psychologist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which someone – we don't know who has – written in 67. But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question [the second special issue], the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

The evidence presented at applicant's trial did not show that applicant was mentally retarded as the AAMD or the APA has defined it. There was no testimony regarding when applicant's IQ was measured or what tests where

assaulting her. Afterwards, they drove her to another apartment where she managed to escape by telling applicant that she needed to take a bath. Applicant asked her if she was going to escape, she said no and applicant allowed her to go to the bathroom where she escaped through the window and subsequently notified the police.

used to measure it. There was no testimony as to the range of IQ or what is considered mentally retarded. There was no testimony or notation on the parole record that applicant was mentally retarded. And, the record is devoid of any evidence indicating that applicant's adaptive functioning was that of a mentally retarded individual.

Primarily relying on an unpublished opinion, applicant contends evidence of an IQ of below 70 alone requires a "*Penry* instruction." However, "[u]npublished opinions have no precedential value and must not be cited as authority by counsel or by a court." Tex.R.App. P. 77.3. The AAMD and the APA disagree with applicant's contention, and in the cases holding that a "*Penry* instruction" was required, the evidence of mental retardation consisted of more than evidence of an IQ below 70. *See Penry* (organic brain damage caused at birth or early childhood abuse and an inability to learn from experience); *see also Rios,* 846 S.W.2d at 315 (testimony from doctors regarding when and how defendant's IQ was measured and conclusion that he was mentally retarded); *Richard,* 842 S.W.2d at 280-83 (severe childhood abuse and doctor's conflicting conclusion that defendant was mentally retarded); *Ex parte Williams,* 833 S.W.2d at 151-52 (testimony regarding when and how defendant's IQ was measured and conflicting conclusions as to whether defendant was mentally retarded); *Ex parte McGee;* 817 S.W.2d at 79-80 (organic brain damage and severe childhood abuse); *Ex parte Goodman,* 816 S.W.2d at 385-86 (testimony that defendant was mentally retarded and possibly suffered from brain damage); *Ramirez,* 815 S.W.2d at 655-56 (childhood abuse, doctor's conflicting testimony as to whether defendant was mentally retarded, and psychological evaluation assessing intelligence and likelihood of organic brain dysfunction).

For these reasons, applicant is not entitled to relief.[9] I therefore join in the judgment of the Court.

PRICE, J., joins.

BAIRD, Judge, dissenting.

In a consistent and unbroken line of cases since the Supreme Court's decision in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), this Court has held evidence of mental retardation cannot be adequately considered within the statutory punishment issues.[1] However, rather than follow this settled precedent,

[9] Applicant is simply not entitled to relief on his claim because there is not enough evidence in the record to support it. The majority comes to this conclusion, too, *Tennard,* at 61, but goes on to offer another basis for denying relief. Assuming arguendo there had been enough evidence in the record of mental retardation, the majority says that reading *Penry*, and subsequent Supreme Court cases like *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), and *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), together, applicant still would not have been entitled to an additional instruction because there was no evidence that his low IQ "rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Id.* at 61-62. While I don't necessarily disagree with this reasoning, it is dicta and unnecessary to the disposition of applicant's claim. Moreover, it overrules several cases from this Court, without acknowledgment. *See Rios,* supra; *Ex parte Williams,* supra; *Ex parte Goodman,* supra.

[1] In *Penry,* the Supreme Court held our capital sentencing scheme operated in an unconstitutional manner when the statutory punishment issues of Tex.Code Crim. Proc. art. 37.071 failed to provide a vehicle for the jury to consider and give effect to potentially mitigating evidence. 492 U.S. at 328, 109 S.Ct. at 2952. During his trial, *Penry* presented evidence of an abused childhood, mental retardation and

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the majority ignores it to reach a desired result. Accordingly, I am compelled to lodge this dissent.

I.

When the evidence raises a fact issue concerning the defendant's mental retardation, the defendant is "entitled to an instruction empowering the jury to assess a penalty less than death, notwithstanding affirmative answers to the special issues, as a 'reasoned moral response' to the fact of his mental retardation." *Rios v. State,* 846 S.W.2d 310, 315 (Tex.Cr.App.1992). In *Rios,* appellant presented "testimony from two witnesses to the effect that appellant tested in the mildly retarded range." *Id.*, at 315. Both of the witnesses had examined Rios five years prior to the date of the offense. After reviewing the evidence presented, this Court held:

> In our view there was a reasonable likelihood that the jury in this case failed to understand

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organic brain damage. 492 U.S. at 308-09, 109 S.Ct. at 2941. The Supreme Court held:

> . . . full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime. In order to ensure reliability in the determination that death is the appropriate punishment in a specified case, the jury must be able to consider and given effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

492 U.S. at 328, 109 S.Ct. at 2951 (internal citations and quotations omitted) (emphasis in original). The Supreme Court concluded the statutory punishment issues of art. 37.071 failed to provide the jury with a vehicle to give effect to Penry's mitigating evidence. 492 U.S. at 328, 109 S.Ct. at 2952.

> that it was entitled to measure evidence of appellant's mental retardation for whatever mitigating weight it may have apart from the special issues. . . . Article 37.071 . . . does not expressly accommodate mitigating evidence apart from its relevance to the special issues. Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of our scheme to confound rather than inform. . . . Without clearer guidance it seems likely the jury would limit its consideration of appellant's mental retardation to whatever tendency it had to disprove deliberateness or to prove future dangerousness. Under *Penry* appellant was entitled to more.

Rios, 846 S.W.2d at 317.

In *Ex parte Williams,* 833 S.W.2d 150 (Tex.Cr.App.1992), the defense produced evidence through an expert witness that applicant had an I.Q. of 53, which is considered mentally retarded. *Id.*, at 151. The State offered rebuttal testimony from an expert witness who testified that "mental retardation cannot be determined solely from intelligence tests" and that further tests would have to be conducted to determine if the applicant was actually mentally retarded. *Id.*, at 152. This Court held "that applicant [Williams] was entitled to a charge instructing the jury that it could consider and give mitigating effect to evidence of his mental retardation." *Id.* (footnote omitted). We so held even though the State argued that it was not a *Penry* case, because there was no evidence of organic brain damage or injury to the applicant. However, this Court specifically refused to interpret "*Penry* to be so limited[,]" *Id.* (citing *Ramirez v. State,* 815 S.W.2d 636, 655-56

(Tex.Cr.App.1991)), and held that when a fact issue is raised concerning the defendant's mental retardation, the jury must be instructed in a manner allowing the jury to consider and give effect to such evidence. *Id.*, at 152.[2]

In *Ramirez v. State,* 815 S.W.2d 636 (Tex.Cr.App.1991), we again held that evidence of mental retardation could not adequately be considered within the statutory punishment issues. In *Ramirez,* Dr. Sarmiento, a defense witness, testified that six years before Ramirez's offense, Sarmiento reviewed an I.Q. test wherein Ramirez scored 57. On cross-examination, Sarmiento admitted he had never actually seen Ramirez and, at the time of the review, Sarmiento had counseled against finding Ramirez mentally retarded. *Id.*, at 655. Even so, we held: "Upon review of this evidence and the *Penry* decision, we are compelled to conclude [Ramirez] was entitled to a charge instructing the jury that it could consider and give mitigating effect to [Ramirez's] evidence." *Id.*, at 656.

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[2] This Court also found it important in *Williams* that during the prosecutor's closing argument, it was argued that there was "no proof of mental retardation." *Id.,* at 152, n. 7. This argument is very similar to the closing argument made by the prosecutor in the instant case:

> "[w]hether [applicant] has a low I.Q. or not is not really the issue. Because the legislature, in asking you to address that [second special issue], the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that [issue]."

However, the majority not only fails to mention the State's closing argument, it fails to mention that it was very likely this argument precluded the jury from giving mitigating effect to evidence of applicant's mental retardation. *See, Williams,* 833 S.W.2d at 152, n. 7.

In *Ex parte McGee,* 817 S.W.2d 77 (Tex.Cr.App.1991), evidence was presented that applicant had "scored 66 on an I.Q. test given shortly before trial" and that "[p]revious test results provided similar scores. . . ."[3] *Id.*, at 80. This Court set aside the conviction, holding: "the record reflects that McGee was mentally retarded." *Id.* Additionally, we again stated the importance of this type of evidence:

> The Eighth Amendment prohibits imposition of the death penalty when the jury is not permitted to express a "reasoned moral response" to potentially mitigating evidence. . . . Because the jury was not allowed to consider McGee's mitigating evidence of mental retardation and an abusive childhood as required by the Supreme Court's holding in *Penry v. Lynaugh,* we set aside the conviction. . . .

Id., at 80.

In *Richard v. State,* 842 S.W.2d 279 (Tex.Cr.App.1992), testimony was introduced at the guilt/innocence phase of appellant's trial that he had "an I.Q. score of 62, which places him in the upper limits of the mentally defective range." *Id.*, at 281. The witness then agreed that appellant

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[3] Just as in this case, there was no evidence presented at McGee's trial of when his I.Q. was measured or what tests were used to measure it. Nor was there any testimony as to the range of I.Q. or what is considered mentally retarded and there was no evidence indicating that McGee's adaptive functioning was that of a mentally retarded individual. However, this Court granted habeas relief. Nevertheless, Judge Meyers now thinks that all of the above are necessary. *See, Ante,* at 67 (Meyers, J., concurring). But our holding in *McGee* undermines his position.

was "educable mentally retarded[,]" but then on cross-examination he described appellant "as slow but not retarded – at least not in the way that most people think of retarded people, no." *Id.* (internal quotations omitted). This Court held: "[t]hese mitigating facts are quite similar to those detailed in *Ramirez* . . ." and that "[l]ike Ramirez, appellant tested in the 'mentally defective' range." *Id.*, at 283. Therefore, "appellant was entitled to a jury instruction authorizing the jury to impose a sentence less than death on the basis of this evidence." *Id.*, at 283.

In *Ex parte Goodman,* 816 S.W.2d 383 (Tex.Cr.App.1991), evidence was presented at the punishment hearing that applicant had an I.Q. of 56, an intellectual level of an eight or nine year old, attended school only to the sixth grade and that he possibly suffered from brain damage. *Id.*, at 385-386. We granted habeas relief because the "jury was precluded from giving mitigating effect to [Goodman's] evidence." *Id.*, at 386.

Especially compelling is the case of *Ex parte Bell* (Tex.Cr.App. No. 70,946, delivered November 6, 1991) (unpublished op.), where the following evidence was developed by Bell's stepfather:

> Question: Did – are you acquainted in any way – are you familiar with Walter's IQ?
>
> Answer: Yes.
>
> Question: And what is that?
>
> Answer: Fifty-four.
>
> Question: And has it been that way for some time?
>
> Answer: Yes.

> Question: To your knowledge, was it that way back in Nineteen-seventy-four?
>
> Answer: Yes.

Bell, slip op. pp. 2-3 (see Appendix). This Court held that "Bell presented sufficient evidence to raise the issue of his mental retardation [,]" *Id.*, slip op. pg. 2, and therefore, "the jury was not instructed to consider and, if necessary, give effect to the mitigating evidence of [Bell's] mental retardation." *Id.*, slip op. pg. 3.[4]

All these holdings were reaffirmed in *Earhart v. State,* 877 S.W.2d 759 (Tex.Cr.App.1994), where this Court held: "*evidence of mental retardation* falls beyond the scope of the statutory punishment issues." *Id.*, at 765 (emphasis added) (citation omitted). However, the majority does not even mention these cases, much less attempt to distinguish them from the instant case.[5] It is the height of intellectual dishonesty to intentionally mislead the bench and bar by failing to inform them of controlling decisions of this Court.

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[4] Because *Bell* was not designated for publication, it is not cited for its precedential value, but only as an example of the majority's refusal to treat similarly situated persons the same.

[5] Judge McCormick, who authors the majority opinion, either voted for or specifically concurred in each and every opinion discussed in this section. But today, in an effort to hide from those votes, he does not even inform the reader of their existence. Instead, Judge McCormick ignores his own advice, namely: "If a majority of this Court agrees on a principle of law, then that constitutes a 'holding' of this Court. . . . Principles of *stare decisis* requires this Court to follow its earlier majority opinions. *This is so basic that it requires no citation to authority.*" *State v. Daugherty,* 931 S.W.2d 268, 279 (Tex.Cr.App.1996) (McCormick, P.J., concurring and dissenting) (emphasis added).

II.

A.

The issue in this case is whether the jury had a vehicle by which it could consider the mitigating evidence.[6] However, the majority intentionally misstates the issue as: "The first question we must ask is whether there is any evidence that applicant is mentally retarded." *Ante*, pg. 60. In that view, the majority holds that to be mentally retarded, a person must show: (1) sub-average general intellectual functioning; (2) concurring deficits in adaptive behavior; and, (3) onset during the developmental period.[7]

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[6] In *Penry, supra,* the Supreme Court was not concerned with whether Penry was or was not mentally retarded. This is evidenced by the fact that in *Penry,* the Supreme Court granted certiorari, *inter alia,* to answer the following question:

> [W]as Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them?

Penry, 492 U.S. at 313, 109 S.Ct. at 2943-44.

[7] Both the majority, *Ante,* pg. 60, and the concurrence, *Ante,* pg. 65, n. 7 (Meyers, J., concurring), place much emphasis on the fact that the Texas Legislature adopted similar definitions in the Persons With Mental Retardation Act. *See,* Health & Safety Code § 591.003 (Vernon 1992). However, what both the majority and concurrence fail to mention is that these definitions were adopted in *1991, six* years after the commission of the instant offense and *five* years after applicant's trial. *See,* Acts 1991, 72nd Leg., ch. 76, § 1. Additionally, this definition was not even adopted by the American Association of Mental Retardation until 1992, and even then, the AAMR classified individuals with an I.Q. score of 75 and below as presumptively retarded. AAMR Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed.1992). *See also, Wills v. Texas,* 511 U.S. 1097, 1099, n. 1, 114 S.Ct. 1867, 1868, n. 1, 128 L.Ed.2d 488 (1994) (Blackmun, J., dissenting to

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Ante, pg. 60. What the majority has done, in clear contravention of established precedent, is weigh the sufficiency of applicant's mitigating evidence and establish a legal threshold a defendant must meet to be entitled to a *Penry* instruction.

This Court has long held that it will not weigh mitigating evidence. A defendant is entitled to an instruction on every mitigating issue raised by the evidence, regardless of whether the evidence is strong or weak, unimpeached or contradicted and regardless of whatever the trial judge may think about the credibility of the offense. *Arnold v. State,* 742 S.W.2d 10, 13 (Tex.Cr.App.1987). For example, in *Ex parte Ellis,* 810 S.W.2d 208 (Tex.Cr.App.1991), the State contended Ellis was not entitled to relief under *Penry* because the "evidence was not argued as mitigating

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the denial of certiorari) *and* N.M. Stat. Ann. § 31-20A-2.1(A) (Michie 1994) ("An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive of mental retardation."). Therefore, both the majority and the concurrence then hold applicant to an evidentiary standard that did not exist at the time of his trial.

This holding is especially strange in light of our holding in *Black v. State,* 816 S.W.2d 350 (Tex.Cr.App.1991), where we held that *Penry* constituted such a substantial change in the law that a defendant did not waive his right to assert a *Penry* violation by failing to object or request a mitigation charge at trial. *Id.,* at 374 (Campbell, J., concurring) (joined by McCormick, P.J., and Clinton, Overstreet, Maloney and Benavides, JJ.). It is absurd to on one hand excuse a defendant from making an objection or request but on the other hand to require the same defendant to meet a diagnostic definition that was not in existence at the time of his trial. However, this is what the majority and concurrence do. The consequence will be to effectively foreclose any successful *Penry* challenges in state court.

applicant's blameworthiness for the crime. . . ." *Id.*, at 211. Nevertheless, we held:

> . . . regardless of when this evidence was presented . . . it is before the jury, and it is a proper subject for the jury's consideration when answering the punishment issues. . . . *The question is merely whether this evidence was before the jury for its consideration.*

Id. (emphasis added). Therefore, it is clear that the issue is not whether applicant was, in fact, mentally retarded, but whether the jury had a vehicle with which to give effect to the mitigating evidence.

B.

In *Penry,* the Supreme Court acknowledged that an I.Q. score of 70 or below classifies an individual as "mentally retarded." *Penry,* 492 U.S. at 308, n. 1, 109 S.Ct. at 2941, n. 1. *See also, Wills v. Texas, supra* note 9. Further, in *Ex parte McGee, supra,* this Court recognized that "[i]n order to be considered mentally retarded, a person must score below 70 on an I.Q. test." 817 S.W.2d at 81, n. 15. *See also, Zimmerman v. State,* 860 S.W.2d 89, 105, n. 14 (Tex.Cr.App.1993) ("*Penry* implies that a person with an I.Q. of 70 or below is presumptively retarded.") (citation omitted). Accordingly, under the prior decisions of both the United States Supreme Court and this Court, applicant's I.Q. of 67 is presumptive of his mental retardation and the majority's holding that there is "no evidence in this record that applicant is mentally retarded" is simply wrong.

III.

A.

The majority then goes on to state that "[a]ssuming the evidence of applicant's low I.Q. somehow falls within *Penry*'s definition of mental retardation, we still hold applicant is not entitled to relief under *Penry.*" *Ante*, pg. 61 (footnote omitted). This is so, the majority reasons, because there was no evidence that his low I.Q. "rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low I.Q. rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Ante*, pg. 62.

To reach this conclusion, the majority relies upon both *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), and *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), for their proposition that applicant must prove his mental retardation rendered him unable to control his impulses or to evaluate the consequences of his actions.

Johnson contended the former version of Tex.Code Crim. Proc. Ann. art. 37.071 failed to provide the jury with a vehicle to consider and give effect to mitigating evidence of youth. 509 U.S. at 351, 113 S.Ct. at 2660. Johnson was nineteen at the time of his offense. 509 U.S. at 356, 113 S.Ct. at 2663. Recognizing that evidence of youth may be mitigating, the Supreme Court held:

> The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe

> that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination.

509 U.S. at 368, 113 S.Ct. at 2669. The Court concluded *Penry* does not require the jury to be able to give effect to mitigating evidence in every conceivable manner in which it might be relevant; mitigating evidence must only be within "the effective reach of the sentencer." 509 U.S. at 368, 113 S.Ct. at 2671. *See also, Graham,* 506 U.S. at 475-76, 113 S.Ct. at 901-902.

In *Graham v. Collins, supra*, Graham contended art. 37.071 did not allow his jury to consider and give effect to mitigating evidence of youth, family background, and positive character traits. 506 U.S. at 463, 113 S.Ct. at 895. In holding Graham's challenges were not cognizable on federal habeas corpus review, the Court stated: "We do not read *Penry* as effecting a sea of change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issue framework." 506 U.S. at 475, 113 S.Ct. at 901 (emphasis in original).

As the cases discussed in Section I, *supra,* illustrate, this Court has always held that the former punishment issues do not provide a vehicle for the jury to consider the mitigating evidence of mental retardation. Neither *Johnson* nor *Graham* impact those decisions; they only affirm the general proposition that most mitigating evidence is within the jury's reach when answering the punishment issues. Moreover, *Penry* was neither overruled nor questioned in *Johnson* or *Graham*.

B.

The majority, however, states the decision in *Penry* is premised upon the fact there was evidence presented "that his mental retardation made it impossible for him at the time of the offense to appreciate the wrongfulness of his conduct or to conform his conduct to the law." *Ante*, pg. 62. Thus, the majority concludes, without specifically saying so, there is a nexus requirement between the evidence of applicant's mental retardation and his moral culpability. However, this conclusion flies in the face of established precedent of this State.

In most cases applying *Penry,* this Court has required a "nexus between the mitigating evidence and culpability for the crime." *Lackey v. State,* 819 S.W.2d 111, 141, n. 10 (Tex.Cr.App.1989) (op. on reh'g). *See also, Goss v. State,* 826 S.W.2d 162, 165 (Tex.Cr.App.1992) ("the evidence must tend to excuse or explain the criminal act, so as to make that particular defendant not deserving of death."). A majority of this Court then adopted the nexus requirement in *Nobles v. State,* 843 S.W.2d 503 (Tex.Cr.App.1992). However, in our application of *Penry,* we have *never* required a nexus between mental retardation and the capital offense. *Richard,* 842 S.W.2d at 283 ("the Court has still not required an express showing of 'nexus' between evidence of mental defectiveness and the offense on trial."). *See also, Goodman,* 816 S.W.2d at 386; *Ramirez,* 815 S.W.2d at 655. This position was unanimously reaffirmed in *Earhart, supra*, where the Court stated: "we do not require proof of a nexus when the defendant presents evidence of mental retardation." 877 S.W.2d at 768, n. 9.

IV.

The majority has obviously ignored settled law to achieve a desired result. This case is a classic example of a defendant who should be able to rely upon the notion, predicated upon *stare decisis,* that in our judicial system similarly situated defendants will receive similar treatment. Because he is not so treated, I dissent.

APPENDIX
Ex parte Walter Bell, Jr.
No. 70,946
Habeas Corpus Application from Jefferson County
OPINION

PER CURIAM.

This is a post conviction application for writ of habeas corpus.[1] Walter Bell seeks to set aside his death sentences based upon the claim that the sentencing jury was not allowed to consider and give effect to mitigating evidence of his mental retardation, religious allegiance, military service, and good character. We granted review to determine whether a defendant who introduces such evidence is entitled to a *Penry* instruction. We will grant applicant's claim.

On July 19, 1974, Fred and Irene Chisum were found murdered in their home. A police investigation led to the arrest of Walter Bell, Jr. He later confessed to the crimes. A jury convicted Bell of the capital murder of Irene Chisum. After the jury answered the statutory special issues in the affirmative, punishment was assessed at death.

[1] *See* Article 11.07, V.A.C.C.P.

Bell's conviction was affirmed on direct appeal.[2] A second jury convicted Bell of the capital murder of Fred Chisum. Punishment in that case was assessed at death. Bell's second conviction was also affirmed on direct appeal.[3] This application relates to and arises from the second capital murder conviction.

In support of his claim, Bell relies upon *Penry v. Lynaugh*.[4] *Penry* declared the Texas death penalty scheme unconstitutional as applied because it failed to provide a manner by which the jury could consider and give effect to evidence of the defendant's severe childhood abuse and mental retardation. The special issues failed to provide a vehicle, which would allow the jury to express its "reasoned moral response" to mitigating evidence when it returned its decision. The Supreme Court, remanding the case, described mitigating evidence as that of a "defendant's background and character . . . [supporting a] belief, long held by society, that defendants who commit criminal acts that are attributable to [such circumstances] may be less culpable than defendants who have no such excuse."[5]

The trial court recommended that Bell be denied relief on the basis of procedural default. However, we have since recognized that a capital defendant does not waive his

[2] *Bell v. State,* 582 S.W.2d 800 (Tex. Crim. App. 1979) *cert. denied,* 453 U.S. 913, 101 S.Ct. 3145, 69 L.Ed.2d 995 (1981).

[3] *Bell v. State,* 724 S.W.2d 780 (Tex. Crim. App. 1986) *cert. denied,* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987).

[4] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[5] *Id.* at 319, 109 S.Ct. at 2947 (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

right to assert a *Penry* challenge when, at the time of trial, the right was not recognized.[6] As a result, Bell was not required to lodge a trial objection or request a special charge.

Bell claims that the special issues did not allow the jury to consider and give effect to evidence he presented at trial. Although evidence may be relevant to the second special issue, it may be relevant only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness.[7] When presented with evidence potentially reducing a defendant's moral culpability, a jury must be allowed to evaluate that evidence. If jurors are not afforded a vehicle allowing them to consider and give effect to such mitigating evidence, the death penalty scheme as applied does not pass constitutional muster.

Bell presented sufficient evidence to raise the issue of his mental retardation. The record reflects that Earl Brown, Bell's stepfather, gave the following testimony:

> Question: Did – are you acquainted in any way – are you familiar with Walter's IQ?
>
> Answer: Yes.
>
> Question: And what is that?
>
> Answer: Fifty-four.

[6] *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App.1991) (Campbell, J., concurring) (joined by McCormick, P.J., Clinton, Overstreet, Maloney, and Benavides, JJ).

[7] *Id.* at 323, 109 S.Ct. at 2949.

> Question: And has it been that way for some time?
>
> Answer: Yes.
>
> Question: To your knowledge, was it that way back in Nineteen-seventy-four?
>
> Answer: Yes.

* * *

This specific evidence was neither objected to nor controverted. This indicates that Bell falls within the mild range of mental retardation.[8] IQ test results included in his application show that he scored 58 in diagnostic tests administered after his arrest. However, we do not consider the post arrest test in support of Bell's claim as this evidence was not before the jury.

Penry teaches that the Eighth Amendment prohibits imposition of the death penalty when the jury is not permitted to express a "reasoned moral response" to potentially mitigating evidence. The Supreme Court has determined that mental retardation is mitigating evidence of the type that requires a vehicle by which the jury has the opportunity to express its reasoned moral response. Here, as in *Penry*, the jury was not instructed to consider and, if necessary, give effect to the mitigating evidence of mental retardation. Thus, we are constrained by the United States Supreme Court holdings in *Penry v.*

[8] In order to be considered mentally retarded, a person must score below 70 on an I.Q. test. *Penry*, 492 U.S. at 308 n.1, 109 S.Ct. at 2941 n.1 (citing Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash L. Rev. 414, 423 (1985)).

Lynaugh to hold, in the instant case, that the Texas death penalty scheme as applied to Walter Bell, Jr., is unconstitutional because the jury was not empowered to consider and give effect to his potentially mitigating evidence of mental retardation.

Accordingly, we set aside the conviction and order Bell Remanded to the custody of the Sheriff of Jefferson County to answer the indictment.

EN BANC

DELIVERED: November 6, 1991

DO NOT PUBLISH

McCormick, P.J. and White, J., concur in the result

Opinion on Federal Habeas, *Tennard v. Johnson*, Civ. No. H-98-4238, U.S. District Court, S.D.Tx. (July 25, 2000)

UNITED STATES DISTRICT COURT — **SOUTHERN DISTRICT OF TEXAS**

ROBERT JAMES TENNARD,	§	Civil Action H-98-4238
Petitioner,	§	(Entered Jul. 25, 2000)
versus	§	
GARY JOHNSON, Director, Texas Department of Criminal Justice,	§	
Respondent.	§	

Opinion on Denial of a Writ of Habeas Corpus

1. *Introduction.*

Robert James Tennard murdered a neighbor for his used Buick. He now seeks to avoid his death sentence.

Tennard argues that:

- He should have been allowed a mental health expert;
- The jury should have been told a co-defendant received a life sentence;
- The jury was not permitted to give mitigating effect to his low intelligence; and
- The prosecutor used peremptory strikes to remove African-Americans from the jury.

The writ of habeas corpus is an exceptional writ. Since before the Constitution it has protected individuals from

wrongful punishment. The writ allows individuals to assert that their criminal convictions and sentences violated the Constitution of the United States. In hearing an application for a writ, the federal court has limited power to reconsider a state's trial and appellate processes.

The state of Texas has the authority to kill a person as punishment. If that decision is constitutionally sound, both in substance and process, it must be affirmed by the federal courts. Texas is wholly bound by the Constitution and laws of the United States. This court's narrow, yet careful, review exists only to ensure that the state afforded full constitutional protection to a man it has sentenced to die. The standards must be high when the result is death.

Tennard's conviction and sentence were not constitutionally flawed.

2. *The Murder.*

Tennard and two friends, Paul Bogany and Daniel "Tiger" Groom, went to the home of Tennard's neighbors, Larry Neblett and Charles Smith.

While Tennard stabbed Neblett, Groom attacked Smith with a hatchet. Groom said that Smith might not be dead yet, and he told Tennard to finish killing Smith. Tennard replied "No. I took care of my victim. You take care of yours." Tr.XXII:410. Neblett, however, was not dead, and he broke a window trying to escape. Tennard and Groom stabbed Neblett again, and he died.

Tennard, Groom, and Bogany stole a record player, television, answering machine-radio, gasoline credit card, and jewelry. They loaded these items, together with a

blanket filled with items they thought they had touched in the house, into Smith's Buick and drove away.

3. *The Trial.*

Tennard was indicted for capital murder and two lawyers – Robert Scardino and Joe Licata – were appointed to defend him. In addition to usual police officers, the principal witnesses against Tennard were Bogany, who described the murders, and Fred Stewart, who testified that Tennard, Groom, and Bogany came to his house with the stolen property. Stewart let them unload the property into his house, and then he let them strip the car in his yard.

On October 6, 1986, Tennard was convicted of capital murder. The next day, the prosecution and Tennard presented evidence about punishment. The jury was then asked to answer these special issues:

> Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury answered both of the special punishment issues "yes," and the trial judge sentenced Tennard to death.

4. *Appeals.*

The Texas Court of Criminal Appeals affirmed. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Tennard filed a state court petition for a writ of habeas corpus. The Court of Criminal Appeals denied Tennard's request for collateral relief. *Ex parte Tennard*, 960 S.W.2d 57 (Tex. Crim. App. 1997), *cert. denied*, 524 U.S. 956 (1998).

Tennard now petitions this court for a writ of habeas corpus, claiming that his constitutional rights were violated by (1) the trial judge's denial of his request for a mental health expert, (2) the jury's inability to give mitigating effect to his "mental retardation," (3) the trial judge's exclusion of evidence that Groom was sentenced to life in prison, and (4) the prosecutor's use of peremptory challenges purposefully to exclude black jurors. The Texas Court of Criminal Appeals denied the second claim on collateral review and the fourth claim on direct appeal. This federal petition is the first time Tennard has raised the first and third claims.

Johnson moved for summary judgment. Tennard replied to Johnson's motion and moved for summary judgment himself.

5. *The Antiterrorism and Effective Death Penalty Act.*

Tennard's petition, filed December 18, 1998, is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996. *Drinkard v. Johnson*, 97 F.3d 751, 766 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997). Under the AEDPA, federal habeas relief cannot be granted unless (a) the factual findings of the state court are based on an unreasonable determination of the facts in light of

the evidence, (b) the legal conclusions reached by the state court are contrary to clearly established federal law as determined by the United States Supreme Court, or (c) the mixed questions of law and fact are determined by the state court based on an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 120 S. Ct. 1495, 1521 (2000)

6. *Procedural Default.*

Tennard admits that he has not earlier raised his claims about the motion for an expert and the exclusion of Groom's life sentence. Relief cannot be granted by a federal court until the applicant has exhausted the remedies available through the state procedures. 28 U.S.C. § 2254(b); *Fuller v. Johnson*, 158 F.3d 903, 905 (5th Cir. 1998), *cert. denied*, 526 S. Ct. 1133 (1999). Conversely, however, an application for a writ of habeas corpus may be denied on the merits even though the applicant has not exhausted his opportunities for the remedies in the courts of the state. 28 U.S.C. § 2254(b)(2).

Johnson argues that Tennard's unexhausted claims are procedurally defaulted because, if presented now to the Texas courts, they would be denied as an abuse of the writ. Procedural default, to act as a bar, must be "firmly established and regularly followed." *Fuller*, 158 F.3d at 906 (citations omitted). New procedural requirements cannot bar federal court review sought by a person who under sentence of death who, in justified reliance on a state's earlier failure to apply an abuse-of-the-writ-doctrine, now seeks protection of his rights under the United States Constitution. *See Ford v. Georgia*, 498 U.S. 411, 423 (1991).

Tennard filed his state habeas application on April 7, 1992. At that time, the abuse of the writ doctrine was not regularly applied and, as a result, was "not entitled to respect as an independent and adequate state ground" for procedural default. *Lowe v. Scott*, 48 F.3d 873, 876 (5th Cir. 1995). Because Texas courts did not apply the abuse-of-the-writ-doctrine in a strict or regular manner, the courts cannot allow it to preclude claims when the petition was filed before 1994. *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998).

Tennard's unexhausted claims are not procedurally barred and are considered on their merits.

7. *Mental Health Expert.*

Tennard argues that he was unconstitutionally sentenced to death because the trial judge refused to grant him a mental health expert to testify during the punishment phase that Tennard was mentally retarded. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Johnson responded that Tennard provided no record support for his statement that the motion was denied. Although the record shows that Tennard asked for a mental health expert, the record does not show that the judge denied his request.

Tennard was given additional time, until May 20, 1999, to supplement the record to support his allegation that he was denied a mental health expert. On May 20, 1999, Tennard notified the court that he would not file a supplemental response.

The record does not support Tennard's statement that the trial judge denied his pretrial motion for a mental health expert. Tennard's inability to supplement the

record with evidence that the request was denied indicates that the evidence does not exist. Tennard cannot obtain federal habeas relief on this unsupported claim.

Even were the court to assume that Tennard's request for a mental health expert was denied, the only mental health issue alleged by Tennard is his low IQ. This issue was addressed fully at trial and was rejected by the jury. Tennard cannot obtain federal relief on this claim.

8. *Co-Defendant's Sentence.*

Groom was tried for capital murder before Tennard's trial. Groom was convicted and was sentenced to life in prison. Tennard wanted the jury to know about Groom's life sentence, but the trial judge excluded the evidence.

The Constitution requires that the jury be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Evidence of a co-defendant's lesser sentence is not relevant to the defendant's character, propensities, record, or offense's context. *Brogdan v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987). The law is clear that "a capital defendant is not entitled to introduce evidence of a codefendant's sentence." *Cordova v. Johnson*, 157 F.3d 380, 383 (5th Cir. 1998), *cert. denied*, 525 U.S. 1131 (1999).

The trial judge's exclusion of evidence of Groom's life sentence does not entitle Tennard to relief.

9. Low IQ.

Tennard argues that his constitutional rights were violated because the jury was not permitted to give mitigating effect to evidence of Tennard's mental retardation. Tennard cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), to support this claim. Tennard presented this claim in his state habeas application, and it was rejected. Evidence of a single low score on an unidentified intelligence test is not evidence that Tennard was mentally retarded. *Ex parte Tennard*, 960 S.W.2d at 61. Additionally, the special issues framework allows the jury to consider and give meaningful effect to relevant mitigating evidence. *Id.*

The requirements of the law are satisfied if the mitigating value of relevant evidence at trial is within "the effective reach" of the jury in responding to the punishment issues. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993). The evidence is within the jury's reach unless there is a "reasonable likelihood that the jury would have found itself foreclosed from considering" the evidence. *Johnson*, 509 U.S. at 368. The trial judge does not have to instruct the jury specifically that they must consider mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

The state district judge's factual findings about Tennard's level of intelligence are fully supported by the evidence. Although Tennard's prison records indicate an old IQ score of 67, Tennard presented no evidence about which test he took, who administered the test, and under what circumstances the test was given. The evidence at trial indicated that Tennard understood the value of the items stolen from Neblett and Smith, recognized the necessity of covering his hands to avoid leaving fingerprints, and

understood that he and his friends needed to remove from the murder scene items that might have their fingerprints. The evidence at trial indicated that Tennard gave directions to Bogany and Groom during the murder and in connection with disposing of the stolen property. The evidence supports the finding that Tennard's low score is not necessarily indicative of mental retardation and that Tennard's ability to reason and to accept responsibility indicates that his low IQ score does not interfere with his general intellectual functioning or behavior.

The holding that the jury in Tennard's case was permitted to give meaningful effect to Tennard's evidence that he has a low IQ is consistent with the law. Tennard presented evidence that his IQ was 67. His attorney argued that Tennard's low IQ affected his ability to act deliberately, citing as an example Tennard's having permitted a prior rape victim to escape through a bathroom window because he believed her when she told him that she would not try to run away if he let her go into the bathroom alone and take a bath. Tennard's attorney argued specifically to the jury that they should "take all these things into consideration, the 67 IQ – in deciding how you answer those questions. You have a right to do that under Texas law." Tr. XXIX:94.

Tennard's low IQ score was not concealed from the jury; it was in evidence, and both sides argued its significance for punishment. The jurors had the means to use Tennard's low IQ score to respond in his favor if they concluded the evidence affected the substance of those inquiries. *See Andrews V. Collins*, 21 F.3d 612, 630 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995) (unlike evidence of severe mental retardation, evidence of lower than average IQ is not mitigating evidence outside the

scope of the special issues). Since the court did not foreclose the jury directly or indirectly from considering Tennard's low IQ, the jury presumably considered it and determined that it did not require a "no" answer to either special issue.

10. Peremptory Strikes.

In his final claim, Tennard argues that the prosecutor used peremptory strikes in a racially discriminatory manner. *See Batson v. Kentucky*, 476 U.S. 79 (1986). To support his claim, Tennard compares the prosecutor's acceptance of prospective juror Emma Lou Hood with the prosecutor's use of peremptory strike to remove prospective juror Evelyn Guillory. Tennard's argument was rejected on direct appeal because the prosecutor offered a sufficient, race-neutral explanation for his decisions and Tennard failed to satisfy his burden to show purposeful discrimination. *Tennard v. State*, 802 S.W.2d at 681-82.

Batson challenges are considered in three steps. First, the defendant must make a *prima facie* showing that the prosecutor used his peremptory strikes in a discriminatory manner. If the defendant completes this first step, the prosecutor must articulate a race-neutral explanation for his decisions. The third step is for the trial court to decide whether the defendant has proven purposeful discrimination. *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 120 S. Ct. 83 (1999). In this case, Tennard, an African-American, recited into the record that the prosecutor used peremptory strikes to remove all but one African-American from the jury. The prosecutor then explained his decisions. The trial judge denied Tennard's challenge.

The appellate court must consider the evidence in the record in a light most favorable to the trial judge's determination. "Reversal is required only if the trial judge's findings of fact are 'clearly erroneous' in light of the entire record." *Tennard v. State*, 802 S.W.2d at 681. Based on this standard of review, Tennard's *Batson* challenge was rejected on appeal. The state court's factual findings are entitled to a presumption of correctness, which Tennard may rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Tennard's only argument in support of his *Batson* claim before this court is that the prosecutor used a peremptory strike to remove Evelyn Guillory, an African-American, and accepted Emma Lou Hood, a Caucasian.

Evelyn Guillory was questioned as a prospective juror when the prosecutor had twelve strikes left. She stated that she was uncomfortable answering questions about the death penalty because she had mixed feelings and was ambivalent about the death penalty. She stated that she does not believe the death penalty is a deterrent. She described her job as a social worker at a hospital as an "advocate for the patient and his rights as a patient." Tr. VI:514. The prosecutor used one of his remaining twelve peremptory strikes to remove Guillory.

Emma Lou Hood was questioned as a prospective juror when the prosecutor had only one peremptory strike left. Although she stated that she did not support the death penalty, she explained her opposition as based on a belief that "death is too easy." Tr. XVI:1677. Hood was also a social worker, but she worked for Harris County in the welfare department. She stated that she considered past criminal activity relevant to the future dangerousness

issue. She stated that punishment for the same crime should be the same whether the defendant is intelligent or slow, rich or poor. The prosecutor decided against using his last peremptory strike to remove Hood, and she became a member of Tennard's jury.

The comparison of the prosecutor's decisions about these two prospective jurors does not provide clear and convincing evidence that the prosecutor used peremptory strikes in a purposefully discriminatory manner. Instead, the prosecutor selected the less charitable of the two potential jurors. Tennard is not entitled to federal habeas relief on this claim.

11. Conclusion.

Tennard has not raised a claim that provides a legal basis for the relief he seeks. "Though the penalty is great and our responsibility heavy, our duty is clear." *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.). Tennard's petition for a writ of habeas corpus will be denied.

Signed July 25, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Robert James Tennard, Petitioner

v.

Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docket for 02-10038

Oct 14 2003 Petition GRANTED and it is consolidated with no. 02-11309. Smith v. Dretke, and a total of one hour is allotted for oral argument in these cases. The motion of petitioner for leave to proceed in forma pauperis is granted.

Supreme Court, U.S.
FILED
DEC 10 2003
OFFICE OF THE CLERK

No. 02-10038

In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Fifth Circuit's rule requiring a "nexus" to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

2. Did the Fifth Circuit err in resolving the plainly substantial question of the effect of *Atkins* on the Fifth Circuit nexus rule by denying a COA, rather than granting a COA and giving the substantive issue the merits consideration it deserves?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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JURISDICTION

The Fifth Circuit announced its latest decision on January 3, 2003. The petition for certiorari was filed on April 3, 2003, and granted on October 14, 2003. *Tennard v. Dretke*, 124 S.Ct. 383 (2003). The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. The relevant portion of the Eighth Amendment provides: "nor [shall] cruel and unusual punishments [be] inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Course of proceedings

Robert Tennard was convicted of capital murder and sentenced to death in Harris County, Texas, in October 1986. The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Thereafter, Mr. Tennard sought habeas corpus relief in the state courts. On December 18, 1997, the Court of Criminal

Appeals denied relief. *Ex parte Tennard*, 960 S.W.2d 57 (Tex. Crim. App. 1997). JA 79.

Mr. Tennard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas on December 18, 1998. The district court denied the petition on July 25, 2000. JA 121. Mr. Tennard filed a timely notice of appeal and requested a certificate of appealability. On March 1, 2002, a panel of the Court of Appeals for the Fifth Circuit denied a certificate in a 2-1 decision. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002), *vacated by*, 537 U.S. 802 (2002). Rehearing was denied on April 4, 2002.

This Court granted Mr. Tennard's ensuing petition for certiorari on October 7, 2002, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)." *Tennard v. Cockrell*, 537 U.S. 802 (2002). On January 3, 2003, the Fifth Circuit on remand reinstated its previous opinion. *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003).

B. Facts material to the issues presented

The evidence at the guilt phase of Mr. Tennard's capital trial established that he and two other men robbed and murdered Larry Neblett and Chester Smith, who were acquaintances of Tennard. As the Court of Criminal Appeals summarized the facts:

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marihuana with the eventual victims, Larry Neblett and Chester Smith, for about half

> an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand. [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims.

Tennard, 802 S.W.2d at 679. In a later opinion in state habeas proceedings, the Court of Criminal Appeals noted the following additional facts pertaining to the offense:

> [Tennard] lived behind the home of the victims, and he knew them. The victims had invited [Tennard] and his two friends into their home approximately fifteen to thirty minutes before they were attacked. [Tennard] stabbed one of the victims fifteen times with a knife while one of [Tennard]'s friends killed the other victim with a hatchet. [Tennard~~] played a dominant role in~~ disposing of the victims' stolen property.

Ex parte Tennard, 960 S.W.2d at 58; JA 80.

In the penalty phase, Mr. Tennard's jury was required to answer only the pre-*Penry*[1] Texas special issues relating to deliberateness and future dangerousness:

> 1. Was the conduct of the defendant, Robert James Tennard, that caused the death of the

[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).

deceased committed deliberately and with the reasonable expectation that the death of the deceased . . . would result?

2. Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

JA 69, 70.[2] The court instructed the jury that if it answered both issues in the affirmative, the court would sentence Tennard to death, but that if it answered either issue in the negative, the court would sentence him to life imprisonment. JA 67.

As in virtually all Texas capital cases tried before 1991, the State's penalty-phase evidence was directed at the future dangerousness special issue. The State proved that Mr. Tennard was convicted of rape at age 16 and was in prison from 1979 until released on parole on April 24, 1985. SF 29:55-56.[3] The complainant in the rape case, Valerie Soto, testified that Tennard had been one of three men who sexually assaulted her. SF 29:27-46; JA 5-26. She also testified that, following the assault, Tennard allowed her to go to the bathroom to take a bath based on her assurance that she would not escape:

Q. Now you told them that you wanted to take a bath?

[2] The Texas death penalty statute in effect at the time of Mr. Tennard's trial called for a third special issue concerning provocation by the victim to be answered in cases in which the evidence raised it, but Mr. Tennard's jury was not instructed on that special issue for lack of evidence raising it.

[3] References to the trial transcript, in Texas then called the "Statement of Facts" (hence "SF"), are to the volume number, and then to the page numbers within that volume.

A. Yes, I did.

Q. Did Mr. Tennard say anything?

A. He told me I wasn't going to try to run away, was I.

Q. What did you tell him?

A. I told him, "No, baby. I like you. I wouldn't do that."

Q. Did he seem to buy this statement?

A. Yes, he did.

SF 29:37-38; JA 16. While in the bathroom, Ms. Soto escaped through a window. SF 29:37-38; JA 16 at 38. On cross-examination, defense counsel brought out a prior statement in which Ms. Soto indicated that one of the other men who assaulted her, and not Tennard, was the leader. SF 29:43-44. JA 16-17.

Tennard's only penalty phase witness was William Kinard, his parole officer. SF 29:56; JA 27-39.[4] Kinard identified "records of Tennard's IQ level according to the Texas Department of Corrections' records." SF 29:56; JA 28. According to those records, Tennard has an IQ of 67. SF 29:58; JA 29.[5] Kinard testified that as a matter of

[4] Tennard proffered evidence that his co-defendant, Daniel Groom, was convicted of capital murder but sentenced to life imprisonment in a separate trial. SF 29:64-65; JA 34-36. The trial court ruled that evidence inadmissible. SF 29:68; JA 38. As the Court of Criminal Appeals' summary of the case indicates, Groom was the sole killer of Chester Smith. Groom also participated in the killing of Larry Neblett: Paul Bogany testified that when Mr. Neblett fell through the doorway of the bedroom after apparently having been stabbed by Tennard, Groom struck Neblett on the head with his hatchet. SF 22:404.

[5] The document noting Mr. Tennard's IQ was introduced thereafter on cross-examination as State's Exhibit 186. *See* JA 63.

course the Texas Department of Corrections tests an inmate's IQ. SF 29:58; JA 28.

Both the prosecution and defense discussed Tennard's IQ evidence in closing. The prosecution spoke to the jury first and preemptively downplayed the evidence: "I'm sure the defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance." SF 29:72; JA 41. "If you feel like that's what you need to do, then that's what you need to do." SF 29:72; JA 41. He alluded, though, to the focus of the special issues, urging the jurors to make their decision "based on the facts," and reminding them to "[l]ook at what you promised us you'd look at. . . . " SF 29:72; JA 41.

Defense counsel indeed focused on how Tennard's impaired intellectual functioning, as evidenced by his low IQ and naivete, together with his poor upbringing, called for a life sentence instead of death. He repeatedly urged the jury to take into consideration Tennard's impaired intellectual functioning. SF 29:85, 93-94; JA 51, 57-58. He reminded the jury that the evidence was not in dispute:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer. . . . Information that the prison psychiatrist had . . . is that Tennard has got a 67 IQ.

SF 29:85; JA 51.

Defense counsel then argued that Tennard's behavior bore the mark of a man with a 67 IQ:

> The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, 'Well, if I let you in there, will you

> leave?' And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient . . . that is *that low*.

SF 29:85; JA 51 (emphasis added). Referring to his subnormal IQ, defense counsel challenged the jury

> to judge [Tennard] as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and *none of you are suffering from a 67 IQ*.

SF 29:93; JA 57 (emphasis added). Not having any way in which he could ask the jury to give effect to Tennard's evidence of low IQ as relevant to either special issue, counsel simply urged the jury to take it into account in deciding how to answer the two issues:

> [T]he law allows you to take all the things into consideration that I talked to you about – attitude toward the death penalty, take all these things into consideration, the 67 IQ – in deciding how you answer those questions. You have a right to do that under Texas law.

SF 29:94; JA 57-58.

In its rebuttal closing argument, the prosecution responded forcefully to defense counsel's plea for consideration of Tennard's low intelligence in connection with the special issues. The prosecutor told the jury that the law did *not* allow the mitigating aspects of such evidence to affect its answer to the future dangerousness issue:

> But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, [sic] the reasons why he became a danger are not really relevant. The fact

that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

SF 29:98; JA 60 (emphasis added).

The jury answered both issues affirmatively, and Tennard was sentenced to death.

SUMMARY OF THE ARGUMENT

For a brief period in modern death penalty practice, defendants were sentenced to death under one anomalous state statute without a determination that they deserved to die. Jurors in Texas were asked only if the defendant's conduct was deliberate and whether the defendant would be a danger in the future. In *Penry v. Lynaugh*, 492 U.S. 302 (1989) [*Penry I*], the Court undertook to end that aberrant practice, reversing the death sentence of a Texas defendant because evidence of his mental retardation and history of childhood abuse had relevance that could not be given meaningful effect within Texas' special issues.

In the years since *Penry I*, virtually none of the defendants sentenced to death under the procedure found unconstitutional in that case have been given new sentencing hearings, despite the fact that many of them presented evidence strikingly similar to Penry's. Instead of following this Court's *Penry I* analysis – which focused squarely on whether jurors could give effect to evidence of a capital defendant's character and record offered in mitigation – the Fifth Circuit has crafted an unprecedented body of law purporting to establish standards for "constitutional relevance." According to this jurisprudence, mitigating evidence is constitutionally irrelevant unless (1) it establishes a "uniquely severe permanent condition" with which the defendant was burdened through no fault of his own, and (2) it is shown to have "caused" the defendant to

commit the crime (the "nexus" requirement). Only evidence that meets these two threshold criteria is analyzed under *Penry I* to determine if the jury could have given it mitigating effect.

This case reveals the divergence of the Fifth Circuit's approach from *Penry I*'s. Evidence of Mr. Tennard's impaired intelligence, reflected both in his 67 IQ score and in his behavior during criminal activity, has long been regarded as mitigating for exactly the same reasons as Penry's evidence of mental retardation. Such evidence, in exactly the same way as Penry's, could not be given adequate effect through Texas' special issues. Indeed, Mr. Tennard's evidence, like Penry's, tended to support an *affirmative* answer to the dangerousness issue and thus to have an *aggravating* rather than a mitigating impact. Nonetheless, when filtered through the Fifth Circuit's elaborate severity and nexus tests, Mr. Tennard's evidence was dismissed as constitutionally irrelevant.

This Court should reject the Fifth Circuit's severity and nexus tests. It should reaffirm that the old Texas special-issue scheme is constitutionally inadequate as applied to defendants whose mitigating evidence could not be given meaningful effect through those issues. It should also reaffirm what is clear in every contemporary death penalty statute (including Texas' post-*Penry I* scheme) – that evidence of reduced culpability need not rise to the level of a full "excuse" from criminal liability before it is deemed constitutionally relevant. Finally, by reversing the decision below, the Court should reaffirm the settled principle that appellate and postconviction courts are not to substitute their assessment of the weight and significance of mitigating evidence for the reasoned moral judgment of jurors relying on their commonsense understanding and experience.

The inappropriateness of the Fifth Circuit's glosses on *Penry I* is apparent from the entire body of pre-*Penry I* law

explaining the Eighth Amendment individualization requirement. It is further confirmed by this Court's recent decisions in *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), invalidating death sentences because of defense lawyers' failures to investigate and develop mitigating evidence. In neither case did the Court suggest that the prejudice prong of the standard ineffectiveness inquiry required the defendant to establish a "uniquely severe" condition through mitigating evidence or a "nexus" linking that condition to the defendant's crime. And it is still further confirmed by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). In holding that the death penalty is disproportionate as applied to persons with mental retardation, *Atkins* took the view that evidence of mental retardation, whether or not explicitly connected by some "nexus" to the defendant's crime, *inherently* mitigates a retarded defendant's moral culpability.

In view of this Court's decisions culminating in *Penry I*, *Penry I* itself, and the post-*Penry I* decisions reconfirming the importance of giving effect to mitigating evidence, the Fifth Circuit's ruling denying a certificate of appealability is insupportable. Not only *could* jurists of reason disagree with the district court's ruling rejecting Mr. Tennard's *Penry I* claim; they are bound to disagree with it. Since the merits of the Fifth Circuit's misguided post-*Penry I* rules are before the Court in the companion case to Mr. Tennard's, and since those rules are wrong both in general and as applied to Mr. Tennard, the Court should also reach the merits here and vacate Mr. Tennard's death sentence.

ARGUMENT

I. THE FIFTH CIRCUIT HAS MISUNDERSTOOD THE RATIONALE OF *PENRY I* AND ERECTED A BODY OF DOCTRINE AT ODDS WITH IT.

In a string of opinions, the Fifth Circuit has misconceived the rationale of *Penry I*, and, proceeding step by step from its initial misconception, has constructed an elaborate body of post-*Penry* doctrine that conflicts with and undermines *Penry*. These rules purport to define the scope of "constitutionally relevant mitigating evidence" and, by constricting it, largely moot the core inquiry mandated by *Penry I*: whether the kinds of evidence relating to a Texas capital defendant's character and record that the defendant offered in mitigation could or could not be given mitigating effect via the two or three special issues prescribed by Texas' pre-*Penry I* death-penalty statute. The Fifth Circuit's rules have had the effect of classifying most mitigating evidence – evidence which every other jurisdiction deems constitutionally relevant – as constitutionally *irrelevant*. Because of these rules, the Fifth Circuit has rarely reached the question whether evidence that is proffered in mitigation could have been given mitigating effect through the special issues. To be "constitutionally relevant mitigating evidence" under the Fifth Circuit's rules, the evidence must show (1) that a defendant is handicapped by a "uniquely severe permanent condition" with which the defendant was burdened through no fault of his own, and (2) that this uniquely severe permanent condition caused him to commit the crime – a second limitation that the Fifth Circuit has termed the "nexus" requirement. *See, e.g.*, *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (en banc) (describing this analytical framework in detail). In the Fifth Circuit's view, the "nexus" requirement is not "peculiar to the Texas special issues [but] goes to the very core of what qualifies as constitutionally relevant mitigating

evidence." *Motley v. Collins*, 3 F.3d 781, 791 n.10 (5th Cir. 1993) (*Motley I*), *withdrawn and superceded*, 18 F.3d 1223, 1234-1235 (5th Cir. 1994). *See also Russell v. Collins*, 998 F.2d 1287, 1292-1293 (5th Cir. 1993) (whether defendant's mitigating evidence was within jurors' effective reach under the special issues is "not relevant," because absent proof of nexus, "the Eighth Amendment is not implicated in the first place"). Similarly, in Mr. Tennard's case and others, it has held that the "uniquely severe permanent handicap" requirement is also not peculiar to the Texas special issues but is a condition that defines constitutionally relevant mitigating evidence in general. *Tennard v. Cockrell*, 284 F.3d at 595. If, and only if, a defendant's proffered mitigating evidence surmounts these elevated barriers is a defendant constitutionally entitled to some means through which the jury can give effect to that evidence in imposing sentence.

We will show in later sections of this brief that there is no support in the Court's death-penalty jurisprudence for the Fifth Circuit's limitations on constitutionally relevant mitigating evidence. Before embarking on that showing, we examine how *Penry I* was violated in Mr. Tennard's case and how the Fifth Circuit's tests for "constitutionally relevant mitigating evidence" diverted the Circuit Court from recognizing the violation.

II. MR. TENNARD ESTABLISHED A VIOLATION OF *PENRY I* NO DIFFERENT THAN PENRY'S OWN, BUT THE FIFTH CIRCUIT FAILED TO CONDUCT AN APPROPRIATE *PENRY I* ANALYSIS.

A. Mr. Tennard's evidence could not be given effect under the special issues.

The sole evidence presented by the defense in the penalty phase of Mr. Tennard's trial was his 67 IQ score. On cross-examination of the defense witness through whom this evidence was introduced, the prosecution

established that the document reporting Mr. Tennard's IQ was not from a psychiatrist, SF 29:59; JA 30, and that the document did "no[t] indicat[e] . . . who may have given those tests or under what conditions." SF 29:60; JA 30. However, the prosecution introduced no evidence to draw into question the accuracy of the assessment of Mr. Tennard's IQ as 67.

In his closing argument, defense counsel argued that "an intelligence quotient . . . that low," SF 29:85; JA 51 – referring to Tennard's IQ of 67 – affected Tennard's judgments and behavior. To illustrate his point, he cited the simplistic, naive judgment Tennard made in relation to his prior rape victim, believing her assurances that if he let her go to the bathroom she would not attempt to escape because she "like[d] [him]," SF 29:37; JA 16. *See* SF 29:85; JA 51. Counsel then argued that Tennard's impaired judgment was a reason to spare Mr. Tennard from the death penalty. SF 29:93-94; JA 57-58. Counsel did not attempt to explain to the jurors how they could bring this evidence to bear in answering either of the special issues, nor could he plausibly have done so. He simply argued that "[t]he law allows you to take . . . [the evidence] . . . into consideration . . . in deciding how you answer those questions." SF 29:94; JA 57-58.

The prosecutors dealt with this evidence and argument in two ways. Anticipating in their initial penalty-phase closing argument that the defense would urge that Mr. Tennard's low IQ was a basis for "giv[ing] him another chance," the prosecutors argued that the jury should, instead, make its decision "based on the facts" relevant to the two special issues. SF 29:72; JA 41. To emphasize that this was the jury's duty, the prosecutor reminded the jurors that each of them had "promised us you'd look at" only the relevant facts. SF 29:72; JA 41. Second, the prosecutors implied that Mr. Tennard's intellectual impairment was one of "[t]he reasons why he became a

danger . . . ," SF 29:98; JA 60, arguing that the "reasons why he became a danger are not really relevant," because "[t]he fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." SF 29:98; JA 60.

Like the petitioner in *Penry I*, Tennard "argues that his mitigating evidence of [impaired intellectual functioning] has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." 492 U.S. at 322. Tennard's jury, like Penry's, "was never instructed that it could consider the evidence offered by [Tennard] as mitigating evidence and that it could give mitigating effect to that evidence." *Id.* at 320. Thus, the determinative constitutional question is whether "the jury had a meaningful basis to consider the relevant mitigating [evidence]. . . ." *Johnson v. Texas*, 509 U.S. 350, 369 (1993).

As in *Penry I*, the first special issue – whether Mr. Tennard killed Mr. Neblett "deliberately and with the reasonable expectation that [his] death . . . would result," JA 69 – was not framed by any definition of the key term, "deliberately." The *mens rea* for the crime charged was described in the jury's instructions as follows:

> A person commits murder when he intentionally causes the death of another.
>
> A person commits capital murder if such person commits the murder in the course of committing or attempting to commit the offense of robbery. [The *mens rea* for robbery is then defined.]
>
> . . . .
>
> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective

> or desire to engage in the conduct or cause the result.

Transcript, *Tennard v. State*, No. 431127 (248th Dist. Ct., Harris County, Tex. 1986), at 156-57; Tex. Pen. Code §§ 19.02(b)(1), 19.03 (a)(2), 6.03(a) (2002). In light of these instructions, and in the absence of any instruction explaining the difference between killing "intentionally" and killing "deliberately," it is impossible to be sure how the jury understood the mental state associated with special issue number one.[6] Indeed, "deliberately" and "intentionally" have such similar meanings and connotations in ordinary language that jurors could easily have concluded that their finding of an intentional killing during the guilt-innocence phase mandated an affirmative answer to the first special issue.[7]

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[6] The Court's observation in *Penry I* is thus accurate both in general and in Mr. Tennard's case in particular: "Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term 'deliberately,' and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it." 492 U.S. at 322.

[7] The evolution of the Texas death-penalty statute makes plain that the "deliberateness" question was not intended to establish a heightened *mens rea* requirement for imposing a death sentence. Rather, the issue was crafted to ensure that defendants convicted under a theory of vicarious liability (called "the law of parties" in Texas) acted with appreciation of the risk of death. Although a capital murder conviction requires an "intentional" killing, persons convicted under the law of parties need not themselves have harbored an intent to kill. *See, e.g.*, Tex. Pen. Code § 7.02(b) (2002) ("If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."). The post-*Penry I* statute makes the goal of this issue clear, replacing the old deliberateness question with a new question

(Continued on following page)

Even "[a]ssuming," as the Court did in these same circumstances in *Penry I*, "that the jurors in this case understood 'deliberately' to mean something more than that [Tennard] was guilty of 'intentionally' committing murder," the result here continues to be governed by the reasoning in *Penry I* that "those jurors may still have been unable to give effect to [Tennard's] mitigating evidence in answering the first special issue." 492 U.S. at 322. Theoretically, Tennard's impaired intellectual functioning, like Penry's mental retardation, "was relevant to the question whether he was capable of acting 'deliberately,'" *id.*, insofar as the jury might have determined that whatever additional planning and preparation are involved in doing an act deliberately – as distinguished from intentionally – were beyond Tennard's limited intellectual abilities. However, the evidence here was not likely to be seen as permitting such a determination. Despite Tennard's limited functioning, it is probable that the jury accepted the prosecution's theory that he deliberately killed Neblett as part of a plan he and Groom put together to "go [ ]in for something."[8] And the fact that neither defense counsel nor the prosecutor (in anticipation or rebuttal) argued to the jury that Tennard's documented IQ of 67 bore upon the special issue whether he acted "deliberately" confirms that

applicable only to persons convicted of murder for an accomplice's homicidal act. *See* Tex. Crim. Proc. Code Ann. art. 37.071, Sec. 2(b)(2) (Vernon 2002) ("in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, [the jury must determine] whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life be taken").

[8] The state's chief witness, Paul Bogany, testified that Tennard had asked him earlier in the evening "if I wanted to go [ ]in for something," SF 22:391, which he understood to mean to "[g]o make some money, go steal, something like that." SF 22:392.

no one at Tennard's trial imagined it could be relevant to that issue. So, if Tennard's limited intellectual functioning and resulting shortsighted judgment – reflected in his decision to allow the rape victim to go to the bathroom – were to be considered mitigating by his jury, it would have had to have been outside the framework of special issue number one and according to some reasoning that made Tennard "less morally 'culpable than defendants who have no such excuse,' but who act[ ] 'deliberately' as that term is commonly understood." *Penry I*, 492 U.S. at 322-23 (citation omitted).[9] As in *Penry I*:

> In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully [Tennard's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of [Tennard's low intellectual functioning] in answering the first special issue. Without such a special instruction, a juror who believed that [Tennard's low IQ] diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that [Tennard] committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to [Tennard's] mitigating evidence.

Id. at 323.

[9] Mr. Tennard's impaired intellectual functioning, like Penry's mental retardation, was not merely "relevant to the question whether he was capable of acting 'deliberately,' but it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" *Penry I*, 492 U.S. at 322 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988)).

Likewise, the second special issue – concerning the probability of Tennard's being dangerous in the future – provided no vehicle for the jury to give mitigating effect to his impaired intellectual functioning. To the contrary, the jury could reasonably have viewed his low IQ as *aggravating* with reference to special issue number two. The jurors could have inferred that Tennard's low IQ was a factor contributing to his previous violent crime of rape and to the capital murders of Larry Neblett and Chester Smith. Making shortsighted judgments – that is, decisions that fail to anticipate the consequences of one's actions – is commonly associated with limited intellectual functioning; and it was clear from the testimony of Tennard's rape victim that Tennard's capacity for normal judgment was impaired. Even without a prompt from the prosecutor, Mr. Tennard's jury could therefore have found that his impaired capacity for making judgments was likely to contribute to violent behavior in the future. And the jury was so prompted when the prosecutor implied in closing that Tennard's low IQ was one of "[t]he reasons *why* he became a danger. . . . " SF 29:98; JA 60 (emphasis added).

Like mental retardation, impaired intellectual functioning is a "two-edged sword." *Penry I*, 492 U.S. at 324. "[I]t may diminish [Tennard's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* Properly instructed, a jury might well view Tennard's impairment as reducing his moral culpability. Properly instructed, such a jury could weigh the mitigating force of this impairment against its aggravating potential under special issue number two. But Mr. Tennard's jury was not properly instructed, and could have viewed his impairment, through the lens of special issue number two, *only* as aggravating. As in *Penry I*, "[t]he second special issue . . . did not provide a vehicle for the jury to give mitigating effect to [Tennard's] evidence of [impaired intellectual

functioning]," *id.*, but rather made the evidence exclusively aggravating or irrelevant.[10]

In sum, Mr. Tennard's trial was infected by the very constitutional error that this Court condemned in *Penry I*. Tennard introduced evidence of impaired intellectual functioning in the penalty phase and focused on that evidence as the central reason for sparing his life. Tennard argued to the jury that this evidence warranted a negative answer to one or another of the special issues, even though the evidence could not logically have supported such an answer or been given mitigating effect through either special issue. The prosecution, for its part,

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[10] Compare *Johnson v. Texas*, 509 U.S. 350 (1993). In *Johnson*, the Court held that a capital defendant's evidence of youth did not require an additional instruction going beyond the former Texas special issues to ensure a constitutionally adequate sentencing determination. The Court based this holding on a finding that youth had particular relevance to the second special issue, which focused on the defendant's future dangerousness. It noted that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." 509 U.S. at 368. Unlike Penry's jury, Johnson's jury therefore "had a meaningful basis to consider the relevant mitigating qualities" of Johnson's evidence. *Id.* at 369.

Mr. Tennard's evidence of impaired intellectual functioning, like Penry's evidence of mental retardation, stands in stark contrast to Johnson's evidence of chronological immaturity. Low intelligence, whether manifest in borderline, moderate, or severe mental retardation, is a permanent condition. Mr. Tennard's jurors could not reasonably have concluded that the "signature qualities" of his low intelligence were "transient," any more than they could reasonably have supposed that these qualities would render him *less* likely to commit criminal acts in the future. The very reasoning by which the Court concluded that the second special issue provided a meaningful vehicle for consideration of Johnson's evidence of youth explains why that issue did *not* provide a meaningful vehicle for consideration of Tennard's evidence of impaired intellectual functioning.

highlighted the jurors' inability to give mitigating effect to the evidence of Tennard's impaired intellectual functioning by telling them that this evidence did not refute Tennard's commission of a deliberate killing and by noting that the evidence showed only *why* Tennard *was* dangerous. The prosecution pointedly reminded the jurors that each of them had "promised us you'd look at" only the relevant facts – the facts relevant to the special issues – as a means of assuring that no juror would embrace Tennard's lawyer's plea to answer one of the special issues "no" on the basis of the logically irrelevant mitigating potential of Tennard's impaired intellectual functioning. Mr. Tennard is unmistakably entitled to relief from his death sentence under *Penry I* unless such relief is barred by the Fifth Circuit's doctrine of "constitutionally relevant mitigating evidence" – to which we now turn.

B. The Fifth Circuit failed to conduct a proper *Penry I* analysis of the record.

The panel majority below[11] held that Mr. Tennard's evidence of impaired intellectual functioning was not constitutionally relevant mitigating evidence or, if it was,

[11] In the 2002 Term, Mr. Tennard sought certiorari review of the Fifth Circuit's original panel decision, 284 F.3d 591, rejecting his claim under *Penry I*. This Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of *Atkins v. Virginia*. *Tennard v. Cockrell*, 537 U.S. 802 (2002). On remand, the Fifth Circuit did not reexamine its decision of the *Penry I* issue, treating the remand as limited to determining whether Tennard had raised an *Atkins* claim. *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003). After concluding that he had not done so, the court reinstated its previous decision. Thus, the present grant of certiorari again on Mr. Tennard's *Penry I* claim, *Tennard v. Dretke*, 124 S.Ct. 383 (2003), brings here for review the decision of the Court of Appeals that is explicated in its first *Tennard* opinion, speaking for a majority of the panel, reported at 284 F.3d 591.

that it could have been given mitigating effect under the two pre-*Penry I* special issues submitted to his jury. On both grounds, the court held, there was no *Penry I* violation. 284 F.3d at 595-97. The way the panel reached this result reflects how far the Fifth Circuit's doctrines elaborating on *Penry I* have strayed from this Court's *Penry I* decision.

The panel explained that "[i]n reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury." *Id.* at 595. "To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition.'" *Id.* (ellipsis in text). The panel then said that Mr. Tennard's evidence of impaired intellectual functioning failed to meet both prongs of the Fifth Circuit test for constitutional relevance.

The evidence failed to meet the "uniquely severe permanent handicap" prong because: "Th[e] Court [of Appeals for the Fifth Circuit] has explained that evidence of a low IQ does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*." *Id.* at 596, citing *Andrews v. Collins*, 21 F.3d 612, 629-30 (5th Cir. 1994), and *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir. 1994). We will shortly return to the "uniquely severe condition" portion of this holding. Prefatorily, it bears note that the two cited cases entirely fail to explain how Mr. Tennard's evidence of impaired intellectual functioning, as it was presented and argued to the jury at his penalty trial, was "within the jury's effective reach pursuant to the teachings of *Penry*." And other than citing the two cases, the panel below made no effort to explain how the special issues permitted mitigating effect to be given to Tennard's evidence.

The evidence in *Andrews* indicated that Andrews "*may* have had a lower-than-average IQ." 21 F.3d at 630. "Because [the evidence] does not demonstrate that Andrews was mentally retarded," the Fifth Circuit declared, "it does not constitute mitigating evidence outside the scope of the special issues." *Id.* The *Andrews* court did not explain how the mitigating qualities of a low IQ could be given effect within the special issues. It simply asserted – without analysis, and with conspicuous ambiguity – that no vehicle was necessary to give mitigating effect to the evidence. *Id.*

The evidence in *Lackey* showed that Lackey had a below-normal IQ. 28 F.3d at 489. In rejecting Lackey's claim that his low IQ could not be given effect within the special issues, the court first appeared to suggest (as had the *Andrews* court, in an alternative holding) that such evidence was not constitutionally relevant because Lackey failed to establish a nexus between his low intelligence and his crime. The court then said that, even if Lackey's evidence was relevant, it could have been given effect through the dangerousness special issue because his attorney had argued that "Lackey's low intelligence . . . show[ed] that he would not be a future danger to society." *Id.* at 490. On this basis, the court "conclude[d] that the jury could have reasonably considered this evidence in answering the second issue." *Id.*

By contrast, Tennard's defense lawyer did not argue that his evidence of impaired intellectual functioning was relevant to either special issue. Tennard's *prosecutor* noted that this evidence could explain why Tennard *was* dangerous and thus implied, without expressly saying so, that the evidence *supported* a finding of future dangerousness. As to whether Tennard's defense lawyer *could* have argued, like Lackey's, that the evidence showed probable non-dangerousness – thereby inviting an even more direct allusion by Tennard's prosecutor to the tendency of such

evidence to prove dangerousness rather than non-dangerousness – it is altogether plain that a defense argument of this sort would have been both illogical and suicidal. There is no logical way in which low intelligence like Tennard's (as distinguished from impairment so severe that it is *physically* incapacitating) could possibly tend to make an individual *less* dangerous. Low intelligence manifests itself in impaired judgment, and impaired judgment can lead to involvement in crimes that can be violent. If Lackey's lawyer was moved to affront every canon of reason and experience by arguing contrarily that Lackey's low IQ reduced the probability of his future dangerousness, such a desperate dodge can only be understood as an artifact of the pre-*Penry I* special issue regime itself. That regime forced lawyers with double-edged mitigating evidence to resort to ridiculous expedients in an effort to persuade jurors to return "no" answers to special issues on the basis of evidence that could rationally support only a "yes" answer. That lawyers were compelled to make such arguments does not mean that the arguments were reasonable,[12] still less that Mr. Tennard, whose lawyer forbore to make such an argument, should have his *Penry I* claim rejected on no more satisfactory analysis than that Mr. Lackey's lawyer made such implausible argument without success.

The panel also held that Tennard's evidence of impaired intellectual functioning did not meet the second prong of the Fifth Circuit test for constitutional relevance. Even if that impairment constituted a "uniquely severe permanent handicap," the panel ruled that Mr. Tennard's

[12] *See Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), recognizing that an exhortation to the jury to consider mitigating evidence through a logically inadequate vehicle does not transform the vehicle into a logically or constitutionally adequate one.

Penry I claim would fail because he had "made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard*, 284 F.3d at 596. "A petitioner must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder," *id.* at 597, because "we have expressly rejected the notion that 'a nexus is inherent between any evidence of mental retardation and a crime.'" *Id.* (quoting *Davis v. Scott*, 51 F.3d 457, 461 (5th Cir. 1995)). Accordingly, "Tennard is precluded from establishing a *Penry* claim because he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his IQ of 67." 284 F.3d at 597.

III. THE FIFTH CIRCUIT'S "UNIQUELY SEVERE CONDITION" RULE CANNOT JUSTIFY DENYING MR. TENNARD RELIEF.

A. Evidence of Mr. Tennard's impaired intellectual functioning must be considered in mitigation of a possible death sentence.

Mr. Tennard's impaired intellectual functioning as reflected in his IQ and in his behavior during criminal conduct constitutes constitutionally relevant mitigating evidence. The significance of such evidence is recognized both in this Court's repeated decisions and in the consensus of state and federal death penalty statutes.

As the Court observed in *Penry I*, "punishment should be directly related to the personal culpability of the criminal defendant." 492 U.S. at 319. *See also California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) ("This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence."). Penry's mental retardation was constitutionally relevant in mitigation because he was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry I*, 492 U.S. at 322. Low

intelligence, whether or not clinically diagnosed as mental retardation, impairs a defendant's ability to assess the consequences of his behavior and to make reasoned, responsible decisions. *See generally* Alexander J. Tymchuk, L. Charlie Lakin & Ruth Luckasson (eds.), *The Forgotten Generation: The Status and Challenges of Adults with Mild Cognitive Limitations* (2001); "Mainstream Science on Intelligence," *Wall Street Journal*, December 13, 1994, A18. It indisputably reduces personal moral culpability.

In a long line of cases stretching back to *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court has invalidated death sentences when defendants were precluded from introducing, or sentencers were precluded from giving mitigating effect to, evidence of impaired ability to control or to comprehend the consequences of criminal behavior. *See, e.g., Bell v. Ohio*, 438 U.S. 637, 640-41 (1978) (exclusive roster of mitigating factors precluded consideration of, *inter alia*, defendant's "'low average or dull normal intellectual capability'" as well as defendant's emotional instability resulting from drug use); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing judge refused to consider youthful defendant's turbulent family history and emotional disturbance); *McKoy v. North Carolina*, 494 U.S. 433 (1990) (jury unanimity requirement precluded adequate consideration of defendant's mental and emotional disturbance); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (failure to permit consideration of non-statutory mitigating factors precluded adequate consideration of, *inter alia*, the present effects of defendant's past drug use (inhaling gasoline) and difficult family background).

This Court's reiterated requirement that capital sentencers must be allowed to consider evidence of impaired mental capacity in mitigation is seconded by consistent legislative judgments and pervasive contemporary practice. Virtually every death-penalty jurisdiction that enumerates mitigating circumstances includes a

factor focused on the defendant's impaired capacity to appreciate the wrongfulness of his or her conduct,[13] and all other States would allow for consideration of such evidence via a catch-all provision.[14] Indeed, the current Texas statute that replaced the old special-issue scheme requires direct consideration of the "circumstances of the offense, the defendant's character and background, and the personal moral culpability" of the offender to determine whether the mitigating circumstances are sufficient to warrant a life sentence. Tex. Crim. Proc. Code Ann. Art. 37.071 Sec. 2(e)(1).

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[13] *See, e.g.*, 21 U.S.C.A. § 848 (1970); 18 U.S.C.A. § 3592 (1994); Ala. Code § 13A-5-51 (1975); Ariz. Rev. Stat. § 13-703 (1977); Ark. Code Ann. § 5-4-605 (1975); Cal. Penal Code § 190.3 (1999); Colo. Rev. Stat. Ann. § 18-1.3-1201 (2002); Conn. Gen. Stat. Ann. § 53a-46a (2001); Fla. Stat. Ann. § 921.141 (1972); Kan. Stat. Ann. § 21-4626 (2002); Ky. Rev. Stat. Ann. § 532.025 (1988); Md. Code Ann., Crim. Law § 2-303 (2002); Miss. Code Ann. § 99-19-101 (2003); Mo. Ann. Stat. § 565.032 (2003); Mont. Code Ann. § 46-18-304 (1977); Neb. Rev. Stat. § 29-2523 (2003); N.H. Rev. Stat. Ann. § 630:5 (2003); N.J. Stat. Ann. § 2C:11-3 (1995); N.M. Stat. Ann. § 31-20A-6 (1978); N.Y. Crim. Proc. Law § 400.27 (1995); N.C. Gen. Stat. § 15A-2000 (1994); Ohio Rev. Code Ann. § 2929.04 (1972); 42 Pa. Cons. Stat. § 9711 (1974); S.C. Code Ann. § 16-3-20 (1976); Tenn. Code Ann. § 39-13-204 (1995); Utah Code Ann. § 76-3-207 (1953); Va. Code Ann. § 19.2-264.4 (1998); Wash. Rev. Code Ann. § 10.95.070 (2002); Wyo. Stat. Ann. § 6-2-102 (1977).

[14] *See, e.g.*, Nev. Rev. Stat. Ann. 200.035.7 (D); Ga. Code Ann. § 17-10-30 (1973); Del. Code Ann. Tit. 11, § 4209 (1975).

B. The Fifth Circuit's "uniquely severe condition" rule is inconsistent with this Court's individualization decisions dating back to *Woodson*, finds no support in *Penry* itself, and cannot be reconciled with the Court's post-*Penry* cases.

1. The Nature of the Fifth Circuit "uniquely severe condition" rule

The Fifth Circuit rejected Mr. Tennard's *Penry I* claim in part on the basis of its longstanding view that mitigating evidence short of a "uniquely severe condition" does not justify relief under *Penry I*. 284 F.3d at 596 ("This Court has explained that evidence of a low IQ does not constitute a uniquely severe condition. . . . "). In this view, evidence of an impairment that does not reach the "uniquely severe condition" threshold is not constitutionally relevant mitigating evidence. *Id.* at 595. *See also Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002), *cert. granted in part by Smith v. Dretke*, 124 S.Ct. 46 (2003). The Fifth Circuit's treatment of impaired intellectual functioning evidenced by low IQ as insufficiently severe to be mitigating has extended to virtually all conditions that curtail a person's ability to make judgments and to appreciate the consequences of behavior. The Circuit has held, for example, that a defendant's evidence of a personality disorder and organic brain damage did not require a supplemental instruction under *Penry I* because the defendant's disabilities were not as severe as those at issue in *Penry I*. *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994). The Fifth Circuit has likewise deemed other sorts of evidence constitutionally irrelevant in mitigation – notwithstanding their classically mitigating character – because such evidence failed to cross the "severity" threshold. *See, e.g., Lackey v. Scott*, 28 F.3d at 489 (evidence of alcoholism); *Davis v. Scott*, 51 F.3d 457 (5th Cir. 1995)

(evidence of parental neglect that was not sufficiently "traumatic").

This view that evidence cannot be genuinely mitigating unless it establishes a uniquely severe condition is also reflected in the Circuit's decisions concerning the Sixth Amendment right to effective representation. In several cases, the Fifth Circuit has found no ineffective assistance of counsel where defense lawyers failed to discover or introduce evidence of very low intelligence that did not constitute severe mental retardation. For example, in *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992), the court described as "weak" a defendant's mitigating evidence of "moderate" mental retardation based on his IQ of 56. *Id.* at 966. According to the court, there was no reasonable probability that a juror would have been persuaded to spare the defendant's life based on such "minimal mitigating evidence." *Id.* Similarly, in *Andrews v. Collins*, 21 F.3d at 624, the court found no ineffective assistance in defense counsel's failure to introduce evidence of the defendant's borderline mental retardation.

2. The "uniquely severe condition" rule cannot be squared with this Court's leading decisions defining the individualization requirement.

This Court has time and again described the Eighth Amendment requirement of individualization in capital sentencing as encompassing any mitigating factor that could persuade the sentencer to return a sentence less than death. In *Lockett v. Ohio*, for example, the lead opinion said that jurors may "not be precluded from considering . . . *any* aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (emphasis added). The Court has repeated this language

in numerous opinions. *See, e.g., Wiggins v. Smith*, 123 S.Ct. at 2543; *Penry v. Lynaugh*, 492 U.S. at 317; *Eddings v. Oklahoma*, 455 U.S. at 112; *Bell v. Ohio*, 438 U.S. at 642. In none of the many pre-*Penry I* cases recognizing and applying the individualization requirement did this Court assert or in any way intimate that evidence is not "constitutionally relevant" unless it meets some "severity" threshold.

Instead, the Court has consistently found violations of the individualization requirement in cases where Fifth Circuit's "uniquely severe condition" test would have precluded such a finding. In *Bell v. Ohio*, 438 U.S. at 640-42, for example, the Court granted relief because of the failure of the Ohio statute to permit adequate consideration of Bell's mental deficiency reflected in part in his "low average or dull normal intellectual capability." *Id.* at 640. In *Mills v. Maryland*, 486 U.S. 367, 370 (1988), the Court held that the state's jury instructions precluded adequate consideration of, among other things, the defendant's mental infirmity reflected in his "minimal brain damage." *Id.* at 370 n.1. And in *Hitchcock v. Dugger*, 481 U.S. at 397, the Court found constitutional error based upon a failure to permit consideration of past substance abuse, including the inhalation of gasoline fumes.[15] Under the Fifth Circuit's

[15] The inappropriateness of the Fifth Circuit's "uniquely severe condition" rule is especially apparent when it is read in conjunction with the Fifth Circuit's additional "no fault" rule, requiring that the "uniquely severe permanent handicap with which the defendant was burdened [resulted] through no fault of his own." *Tennard*, 284 F.3d at 595; *Smith*, 311 F.3d at 680. *See also Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) (rejecting evidence of substance abuse because it was self-inflicted). The manifest inconsistency of the "no fault" rule with this Court's *Hitchcock* decision recognizing voluntary drug use as mitigating simply confirms that the Fifth Circuit's test for constitutional relevance, of which the "uniquely severe condition" rule is a part,

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"uniquely severe condition" rule, these cases should not have required consideration of the sorts of evidence they did, because the evidence did not show conditions sufficiently severe to be deemed constitutionally mitigating. *See, e.g., Smith*, 311 F.3d at 682 (defendant's "low IQ" and "borderline mental abilities" are inadequate to establish "'uniquely severe permanent handicap'" (quoting *Davis*, 51 F.3d at 460); *Lackey v. Scott*, 28 F.3d at 489 (rejecting evidence of alcoholism as insufficiently "severe").

3. *Penry I* cannot be read to establish a "uniquely severe condition" rule.

In several of its decisions elaborating the "uniquely severe condition" rule, the Fifth Circuit contrasts the purportedly "unique" aspects of Penry's evidence with the evidence offered by the condemned inmates in those cases. *See, e.g., Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*); *Robertson v. Cockrell*, 325 F.3d 243, 251-52 (5th Cir. 2003) (*en banc*). Indeed, in the companion case now before the Court, *Smith v. Dretke*, No. 02-11309, the Fifth Circuit describes Penry's evidence in detail, enumerating his specific IQ range, his organic brain damage, his poor performance in school, and his abuse as a child. *Smith v. Cockrell*, 311 F.3d at 681. The court also highlights the opinion of a defense psychiatrist in *Penry I* who testified during the guilt-innocence phase that Penry's mental deficits "'made it impossible for him to appreciate the wrongfulness of his conduct.'" *Id.* (quoting *Penry I*, 492 U.S. at 307-09). These descriptions of Penry's evidence are aimed at establishing a firm "severity" requirement that can serve to foreclose claims based on less dramatic

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is fundamentally out of keeping with this Court's individualization caselaw.

evidence. *See id.* at 680: "On the issue of whether the defendant has a 'uniquely severe permanent handicap', this court has limited *Penry I* to the facts of that case."

Nothing in the text or the analytic approach of the *Penry I* decision supports this kind of reading. The *Penry I* Court did not describe Penry's evidence as "unique" or "severe" or as revealing an extreme degree of disability. Rather, in accord with *Lockett* and *Eddings*, the Court concluded simply that Penry had presented evidence of reduced culpability which could not be given sufficient consideration via the old Texas special-issue scheme. 492 U.S. at 322 ("Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment.").

Moreover, the structure of the opinion confirms that the *extent* of Penry's impairment was not essential or even related to the ultimate result. The Court describes Penry's evidence in Part I of the opinion, which takes the form of a thorough but non-evaluative recital of the facts and posture of the case. In Parts II and III of the opinion, in which the Court considers Penry's constitutional claim of inadequacy of the special-issue procedure, the Court never again mentions any specific details of Penry's mitigating evidence. Instead, the Court emphasizes *Lockett*'s ruling that a sentencer may "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 604).

In deciding the companion case below, the Fifth Circuit stressed a distinction between the mitigating evidence in that case and testimony given at the guilt-innocence phase

of *Penry I* dealing with Penry's inability "'to appreciate the wrongfulness of his conduct.'" *See Smith*, 311 F.3d at 681 (quoting 492 U.S. at 307-09); *and see* 311 F.3d at 682 ("Smith's expert, Dr. Fason, did not testify that Smith was mentally retarded, let alone that his mental retardation made him unable to appreciate what he had done. . . ."). This treatment of the evidence conflates the concepts of mitigation and exculpation. Of course, certain types of intellectually debilitating conditions, if proven to a particular degree, will preclude any criminal liability for a defendant's conduct. *See, e.g.*, Tex. Pen. Code § 8.01(a) (2002) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."). At Penry's trial, if the jury had been persuaded that his mental deficits wholly precluded his ability "to appreciate the wrongfulness of his conduct," Texas law would have required a not guilty verdict, and the punishment phase would never have been reached. But the jury, by finding Penry guilty of capital murder, clearly *rejected* Penry's guilt-innocence phase claim that he could not appreciate the wrongfulness of his conduct. This Court's decision in *Penry* thus does not require that a defendant offer testimony, as in Penry's trial, of a completely debilitating condition. It confirms the opposite: even when a jury does *not* credit the presence of a uniquely severe condition, evidence *short* of such a disability must be afforded a vehicle to be considered as *mitigating* though not *exculpating*.

Indeed, the Court has always understood mitigation as something less than exculpation. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), for example, the trial judge had taken the position that he was precluded by law from considering evidence of the defendant's troubled childhood and emotional disturbance in mitigation. The Oklahoma Court of Criminal Appeals affirmed Eddings' death sentence on the ground that this evidence did not support a

finding of any legal excuse from criminal liability. This Court then reversed because "such evidence was undoubtedly relevant to mitigation even if it did not *excuse* the defendant's conduct." *McKoy v. North Carolina*, 494 U.S. at 441 (explaining the Court's rationale in *Eddings*).[16]

4. This Court's decisions following *Penry I* leave no room for the Fifth Circuit's "uniquely severe condition" rule.

The Court's cases since *Penry I* confirm that the Fifth Circuit's "uniquely severe condition" rule is altogether untenable. Just one Term after *Penry I*, the Court invalidated a North Carolina requirement of jury unanimity as a precondition for jurors' consideration of mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433 (1990). In *McKoy*, the State had sought to defend this unanimity requirement on the ground that it was a permissible rule of "relevance." North Carolina's argument – analogous to the Fifth Circuit's justification for the severity rule – was that extenuating evidence had to possess a minimum degree of strength before it could be considered "relevant" in mitigation; the unanimity requirement was defended as

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[16] In this respect, the Court has followed the logic of the Model Penal Code's death penalty provision, drafted by the American Law Institute a decade before *Furman v. Georgia*, 408 U.S. 238 (1972). Model Penal Code § 210.6(4)(b)-(h) (Proposed Official Draft 1962). The enumerated mitigating factors in the proposed code focus overwhelmingly on imperfect exculpation, consistent with the Model Penal Code's more general attempt to link punishment to culpability. The Model Penal Code commentary explains that the Code's choice of mitigating factors reflects the "widespread acceptance" of the idea that "diminished" or "partial" responsibility should reduce first-degree to second-degree murder. *Id.*, § 210.6 cmt., at 138-40 (1980); *see* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 Yale L.J. 835, 856-57 (1992) (discussing the Model Penal Code's focus on reduced culpability).

a mechanism serving to guarantee the requisite degree of strength. *See* 494 U.S. at 440. This Court resoundingly rejected any such notion of constitutional "relevance":

> [T]he State Supreme Court's holding that mitigating evidence is 'relevant' only if the jury unanimously finds that it proves the existence of a mitigating circumstance distorts the concept of relevance. "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"

Id. (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting Fed. R. Evid. 401)). Thus, the degree of strength of evidence proffered by a capital defendant in mitigation is a matter for the sentencer to decide, not a ground for withholding the evidence from the sentencer by declaring it irrelevant: "the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." 494 U.S. at 441.

The Court's recent decision in [*Terry*] *Williams v. Taylor*, 529 U.S. 362 (2000), also implicitly rejects the Fifth Circuit's "uniquely severe condition" rule. *Williams* grants Sixth Amendment ineffective-assistance-of-counsel relief to a Virginia defendant whose lawyer failed to develop mitigating evidence – primarily evidence of the defendant's abused background and borderline mental retardation – at the penalty phase of his capital trial. The Virginia Supreme Court had rejected Williams' claim in large part because it did not find prejudice resulting from counsel's failure. 529 U.S. at 396. This Court, however, faulted the Virginia Supreme Court's refusal to recognize that evidence of "abuse and privation, *or* the reality that

[the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398 (emphasis added).[17] Plainly, the Court in *Williams* concluded that Williams' undeveloped evidence of borderline mental retardation was mitigating; equally plainly, the Court in *Williams* saw no need to inquire whether borderline mental retardation is a "uniquely severe condition" in order to reach this conclusion.[18]

IV. THE FIFTH CIRCUIT'S "NEXUS" RULE CANNOT JUSTIFY WITHHOLDING RELIEF FROM MR. TENNARD.

A. The Fifth Circuit's "nexus" rule.

The Fifth Circuit created its "nexus" rule in the wake of the decision in *Penry I*, as it addressed claims by death-sentenced inmates that the former Texas capital sentencing statute had denied them an adequate vehicle for the jury's consideration of their mitigating evidence. In its original form, the rule was perhaps less onerous than it

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[17] This aspect of *Williams* plainly overrules the Fifth Circuit's cases discussed at page 28 *supra*, holding that "moderate" mental retardation is "weak" for purposes of discerning prejudice in the Sixth Amendment context.

[18] More recently, in *Wiggins v. Smith*, 123 S.Ct. at 2543, the Court found Wiggins' trial counsel ineffective for failing to investigate and introduce evidence of Wiggins' abused background, and held that Wiggins was prejudiced by counsel's deficient performance. *Wiggins* demonstrates the error of still another canon in the Fifth Circuit's radically misconceived post-*Penry I* jurisprudence – the Fifth Circuit axiom that childhood abuse standing alone does not constitute constitutionally relevant mitigating evidence. *See Robertson v. Cockrell*, 325 F.3d at 251 ("*Penry I* required such a vehicle only with regard to evidence of diminished culpability arising from a *combination* of extreme childhood abuse *and* mental retardation." (emphasis added)).

quickly became. In *Graham v. Collins*, for example, the court stated that evidence of a defendant's disability could "reduce culpability where it is *inferred* that the crime is attributable to the disability." 950 F.2d at 1033 (emphasis added).[19] By 1994, however, the Fifth Circuit's application of its "nexus" rule had grown increasingly rigid. In *Madden v. Collins*, the court refused to require additional instructions to permit the jury to give mitigating consideration to Madden's evidence of personality disorder and organic brain damage because those mental disorders were "not linked *causally* to the criminal act," and because he presented "insubstantial evidence that his childhood abuse . . . had such a psychological effect on him *that it led to the criminal act*." 18 F.3d at 308 (emphases added).

As the Fifth Circuit's cases following *Madden* have made clear, the "nexus" rule reflects a general theory of mitigating relevance that requires the defendant to prove a causal connection between any proffered mitigating circumstance or condition and the offense before the sentencer is required to consider that circumstance or condition in mitigation of punishment. *See, e.g.*, *Nelson v. Cockrell*, 77 Fed. Appx. 209, 213 (5th Cir. 2003) (unpublished) (rejecting a contention based on *Penry I* because "no evidence suggested that [if] there was brain damage, Nelson's [criminal] acts were *caused* by it") (emphasis added); *Robertson*, 325 F.3d at 253 (rejecting a *Penry I* claim based on evidence of child abuse because the abuse suffered by the defendant "was shown neither to be severe

[19] *See also, e.g.*, *Russell v. Collins*, 998 F.2d at 1292 (there is no need to prove "a precise nexus between [the defendant's] background evidence and the crime," so long as a "rational jury [could] *infer*" at least a partial connection between them) (emphasis added); *Motley I*, 3 F.3d at 791 ("if a jury could reasonably *infer*" that the crime is "*in some way* attributable" to the defendant's condition, "no more specific nexus is required") (emphases added).

nor to have any *causal* nexus with his crimes") (emphasis added).

The rigidity with which this rule has been enforced is reflected in the fact that the Fifth Circuit has virtually never found a defendant to have established a sufficient causal "nexus" between his or her mitigating condition and the crime to warrant additional instructions going beyond the old special-issue questions. In only one reported case, *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. 2002), has the Fifth Circuit found its nexus requirement satisfied. *Blue*, 298 F.3d at 321 (sufficient nexus to uphold *Penry II* claim where expert testified that defendant's mental retardation, paranoid schizophrenia, and antisocial personality disorder made it "almost inevitable that he would be in conflict with the law"). In one early case involving child abuse, the court originally found a nexus but subsequently reversed itself because the consequences of that abuse were not "permanent" and thus required no additional instruction. *Motley v. Collins*, 3 F.3d 781, 791 (5th Cir. 1993), *opinion withdrawn and superseded*, 18 F.3d 1223, 1234-35 (5th Cir. 1994). In all other reported cases, the court has found no nexus between the defendant's claimed mitigating circumstances and his crime.

B. The Fifth Circuit's "nexus" rule represents an unjustified departure from this Court's individualization and proportionality decisions.

The Fifth Circuit has erected its entire "nexus" edifice on the foundation of a single word in a single sentence in Justice O'Connor's *Penry I* opinion. Justice O'Connor wrote there that evidence about a defendant's background and character are viewed as mitigating because "'defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have

no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis added). *See, e.g.*, *Robertson*, 325 F.3d at 252 (citing *Penry I's* "attribution" language). As we will show below, neither a proper reading of Justice O'Connor's "attribution" phrase nor the conception of mitigation in which it is grounded supports the Fifth Circuit's view of "nexus" as a black-letter condition precedent to consideration of a capital defendant's mitigating evidence.

To begin with, the Fifth Circuit's exegesis of Justice O'Connor's "attribution" language fails to take account of its setting, which provides essential context for understanding what it means. When describing the role of mitigating evidence in reducing a defendant's moral culpability, Justice O'Connor begins by stating that she is articulating a "belief long held by this society." *Penry I*, 492 U.S. at 319; *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). She is thus drawing on traditional attitudes reflected in longstanding practices within our criminal justice system. As the Court recognized in *Woodson v. North Carolina*, 428 U.S. at 294-98, almost from this country's founding in the late 18th Century and continuing into the 20th Century, American jurisdictions progressively moved toward a system of capital sentencing in which jurors were permitted to consider and assess the significance of mitigating evidence bearing on the offender and the offense. The adoption of this approach reflected in large part a shared and evolving view that a defendant's circumstances – the obstacles, vicissitudes and deficits that he or she endured – are relevant to the just assessment of punishment.

The Fifth Circuit's rigid "nexus" rule, on the other hand, derives no support, much less longstanding support, from the history or traditions of the States in administering their criminal justice systems generally or the death

penalty in particular. Such a rule, which decrees arbitrarily that no circumstance in a human life can be deemed to warrant the mitigation of punishment unless it bears a specific, identifiable cause-and-effect relationship to the criminal act being punished, has no historical or contemporary credentials in either theory or practice. None of the post-*Furman* federal or state capital sentencing statutes contains a "nexus" rule or any similar restriction of the reasoning through which jurors are permitted to arrive at a "'reasoned moral response' to . . . evidence [proffered in mitigation] in determining whether death [is] the appropriate punishment." *Penry I*, 492 U.S. at 322. Nor have state or federal courts (outside of the *Penry* litigation) imposed or even discussed such a restriction. In its many decisions establishing and elaborating the Eighth Amendment's individualization requirement, this Court likewise has never hinted that trial or appellate judges – as opposed to jurors – are to determine as a threshold matter whether a sufficient connection exists between a defendant's mitigating evidence and his or her crime to justify a sentence less than death.[20]

Thus, the Fifth Circuit appears to have mistaken Justice O'Connor's explanatory *description* of the reason why jurors tend to find certain experiences and characteristics mitigating for a doctrinal *prescription* – a mandatory rule of constitutional law that places on each and every capital defendant the heavy burden of documenting that his or her crime was deterministically "caused" by any circumstances s/he asserts in mitigation. That distorts Justice O'Connor's point entirely. For the "belief long held by this society" to which she referred is that persons who come from a "disadvantaged background [or suffer from] emotional and mental problems" are *as a matter of common*

[20] See the opinions cited in notes 22-24 *infra*.

experience and understanding less likely than others to be able to control their impulses or fully appreciate the consequences of their criminal conduct. The link between such circumstances and a susceptibility to involvement in crime is not something the defendant is obliged to prove by "causal" mechanics, but is rather a connection that already resides in our common stock of knowledge about how people's experiences and frailties can shape or misshape their lives. Jurors are expected and trusted to bring this knowledge to bear in assessing the mitigating force of a defendant's background; and the teaching of *Penry I* is precisely that they may not constitutionally be precluded from doing so.

Justice O'Connor's "attribution" observation in *Penry I* is, of course, a quotation from her concurring opinion in *California v. Brown*. The question before the Court in *Brown* was whether an instruction cautioning the jury not to be swayed by, *inter alia*, "mere sympathy" in determining sentence had the effect of limiting their consideration of the defendant's mitigating evidence. *Brown*, 479 U.S. at 541-42. Justice O'Connor found that it did not, and the phrase in which she crystallized her view of a capital sentencing jury's role illuminates the "attribution" phrase upon which the Fifth Circuit has placed such great weight. As Justice O'Connor put it, "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed . . . should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." 479 U.S. at 545. This analysis, read as a whole, reveals Justice O'Connor's first premise to be that what makes a "reasoned moral response" *reasoned*, not based solely on emotion, is that it results from assessing the facts of each particular case in light of the longstanding Anglo-American societal consensus that defendants who come from "a disadvantaged background" or are burdened by

"emotional and mental problems" can fairly be regarded as less culpable for their criminal conduct.

Moreover, the Fifth Circuit's reading of Justice O'Connor's "attribution" phrase in *Penry I* flies in the teeth of explicit statements about the nature of constitutionally protected mitigating evidence in other opinions that Justice O'Connor has joined or authored. For example, in *Payne v. Tennessee*, 501 U.S. 808 (1991), she joined Chief Justice Rehnquist's opinion for the Court, which observed that Payne had presented evidence that included "a low IQ," and that this and other evidence was constitutionally mitigating despite the fact that "[n]one of this testimony was related to the circumstances of [the] crimes." 501 U.S. at 826. Similarly, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), Justice O'Connor pointed out that "[n]one of [the defendant's mitigating] evidence was directly relevant to the events of [the crime], but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness." 490 U.S. at 817-818 (O'Connor, J., dissenting on other grounds). These expressions cannot be reconciled with the Fifth Circuit's extrapolation of a "nexus" rule from Justice O'Connor's "attribution" phraseology in *Penry I*.

In addition to attempting to tie its "nexus" prescription to Justice O'Connor's *Penry I* opinion, the Fifth Circuit has attempted to package that prescription, together with the accompanying prescription that mitigation must consist of a "uniquely severe condition," as a rule of "constitutional relevance." *See, e.g., Tennard*, 284 F.3d at 595 ("[t]o be constitutionally relevant," mitigating evidence must show a nexus with the criminal act). As we noted in our discussion of the "uniquely severe condition" construct in Part III *supra*, this conception of "constitutional relevance" cannot be sustained in light of *McKoy v. North Carolina*. In *McKoy*, the Court rejected North Carolina's effort to preclude jurors from considering

evidence offered in mitigation that its state supreme court had declared "legally irrelevant" because it was insufficiently strong to convince all members of the jury unanimously that certain facts were true and deserved to be viewed as mitigating. 494 U.S. at 438. Noting that the state court's rationale "distorts the concept of relevance," *id.* at 440, this Court explained that "mitigating circumstances not unanimously found to be present by the jury did not become 'irrelevant' to mitigation merely because one or more jurors did not believe that the circumstance had been proved as a factual matter *or did not think that the circumstance, though proved, mitigated the offense.*" 494 U.S. at 440-441 (emphasis added; footnote omitted). *McKoy* refused to permit the North Carolina Supreme Court to substitute a legal rule of acceptable mitigation for the sentencer's judgment as to what should be deemed mitigating in the case of each individual defendant, saying that the Court's earlier holdings in *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "show that the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence *if the sentencer could reasonably find that it warrants a sentence less than death.*" *McKoy*, 494 U.S. at 441 (emphasis added).

As we also noted in Part III, it is not just the *Eddings-Skipper-McKoy* line of cases that refutes the Fifth Circuit's misreadings of *Penry I*. Last Term in *Wiggins v. Smith*, this Court reversed Wiggins' death sentence because his lawyer failed to investigate and present to his sentencing jury evidence of, *inter alia*, Wiggins' "privation and abuse" prior to age six and "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." 123 S.Ct. at 2542. In finding that "th[is] kind of troubled history [is] relevant to assessing a defendant's moral culpability," *id.*, the Court in *Wiggins* cites *Penry I*, *Eddings*, and *Lockett*. Notably, it nowhere suggests that Wiggins' traumatic childhood and adolescence experiences

were "relevant" solely to the extent that they constituted a "but-for" cause of his offense.

Similarly, in [*Terry*] *Williams v. Taylor*, the Court found trial counsel ineffective for failing to present mitigating evidence about Williams' troubled background but did not suggest that the unpresented mitigating evidence met – or had to meet – any test of relevance involving a causal connection to Williams' crime. To the contrary, the Court held that counsel's failure to present this background evidence required a new penalty trial for Williams even though the evidence manifestly provided no simplistic, "causal" explanation for Williams' having committed the crime. In the Court's view, a penalty retrial was required because the evidence which Williams' lawyer had not presented, including specifically evidence of Williams' "childhood [of] abuse and privation," "might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Justice O'Connor – who, according to the Fifth Circuit, laid the cornerstone for its "nexus" rule in her *Penry I* opinion – agreed that resentencing was required in *Williams*. 529 U.S. at 413. She, too, never hinted that Williams' deprived and abused upbringing or his borderline mental retardation became relevant only if such circumstances strictly "caused" him to commit the crime. Instead, she stated without qualification that such evidence was vital for the jury to consider, *id.* at 414-16, and she joined the portion of Justice Stevens' opinion emphasizing its relationship to the jury's assessment of his "moral culpability." *See also Robertson*, 325 F.3d at 273 (Stewart, J., dissenting) (pointing out that *Williams*' characterization of all this evidence as mitigating did not

depend on its having any causal connection to the offense).[21]

As these cases illustrate, the Fifth Circuit's "nexus" rule finds no support in the Court's opinions that describe what counts as constitutionally relevant mitigating evidence,[22] interpret the concept of "relevance" generally,[23] and depend on jurors to grasp the significance of evidence presented in a capital sentencing proceeding based on their common sense and life experience.[24] Nor can the mechanistic character of the "causal" inquiry required by the "nexus" rule be squared with the Court's repeated recognition that the capital sentencing decision is, in its essence, not about reductionistic factual connections but about irreducible moral judgments.[25] The ultimate question

[21] Three years ago, shortly after *Williams* was announced, the Fifth Circuit acknowledged in a footnote that its "nexus" rule was "not consistent with" *Williams*. *Dowthitt v. Johnson*, 230 F.3d 733, 746 n.15 (5th Cir. 2000). Notwithstanding this acknowledgment, the Fifth Circuit has continued uniformly to enforce the "nexus" rule.

[22] *See, e.g., Lockett v. Ohio*, 438 U.S. at 604 (constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the crime that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma*, 455 U.S. at 110 (same); *Skipper v. South Carolina*, 476 U.S. at 4 (same).

[23] *See, e.g., McKoy v. North Carolina*, 494 U.S. at 440 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 345 (same, quoting Fed. R. Evid. 401)) ("[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

[24] *See, e.g., Boyde v. California*, 494 U.S. 370, 383-385 (1990) (emphasizing ability of jurors to appreciate the significance of mitigating factors); *Buchanan v. Angelone*, 522 U.S. 269, 272, 278 (1998) (same); *Weeks v. Angelone*, 528 U.S. 225, 234-35 (2000) (same).

[25] *See, e.g., Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (describing the capital sentencing decision as "a highly subjective, unique, individualized

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for the capital sentencer is nothing less than whether "death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. That question, as the Court has consistently taught since it outlawed mandatory death sentences in 1976, lies at the very heart of the Eighth Amendment's prohibition of cruel and unusual punishments.

The Fifth Circuit's "nexus" rule disregards all of these teachings. Its inflexible insistence on a showing that any proffered mitigating circumstance was "linked causally to [the defendant's] criminal act" before the jury may consider evidence of that circumstance suggests a fundamental confusion of mitigation with excuse. A defendant whose criminal act is mechanically "attributable" to a uniquely severe permanent condition brought about through no fault of his or her own is traditionally understood to have a complete defense to criminal liability, as when a defendant claims that the crime was the product of a mental disorder that rendered him or her incapable of understanding what s/he was doing or of refraining from doing it.[26] It

judgment regarding the punishment that a particular person deserves") (citation and internal quotation marks omitted); *Penry I*, 492 U.S. at 322-23; *California v. Ramos*, 463 U.S. 992, 1007-1009 (1983).

[26] Much of the mitigating evidence traditionally understood as indispensable to an assessment of the defendant's personal moral culpability takes the form of an imperfect defense, *i.e.*, it functions to reduce, but not eliminate, the degree to which the defendant is morally blameworthy for the crime, and thus influences the sentencer's judgment about what constitutes an appropriate punishment. Many of the mitigating circumstances enumerated in various capital sentencing statutes reflect this perspective. *See, e.g.*, 18 U.S.C. §§ 3592(a)(1) (mitigating circumstance that defendant's ability to appreciate wrongfulness of his conduct or comply with the law was "significantly impaired, regardless of whether [his] capacity was so impaired as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(1) (same); Ariz. Rev. Stat. §§ 13-703(1) (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201(4)(b) (same); Conn. Gen. Stat. Ann. §§ 53a-46a(h)(3) (same); Ky. Rev. Stat. §§ 532.025(7) (same); N.H. Rev. Stat. §§ 630:5(VI)(a) (same); N.J. Stat.

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was precisely this sort of confusion about the difference between mitigation and excuse that this Court was required to correct in *Eddings v. Oklahoma*. The state court there had concluded that Eddings was not constitutionally

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Ann. §§ 2C:11-3(5)(d) (same); Tenn. Code Ann. §§ 39-13-204(j)(8) (same); Ill. Comp. Stat. Ch. 720 §§ 5/9-1(21)(c)(2) (defendant committed murder "under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution"); Ky. Rev. Stat. §§ 532.025(b)(2) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(e) (defendant was "mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution"); Ky. Rev. Stat. §§ 532.025(7) (defendant's capacity was impaired as a result of intoxication even though "insufficient to constitute a defense to the crime"); 18 U.S.C. §§ 3592(a)(2) (defendant was "under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(2) (same); Ariz. Rev. Stat. §§ 13-703 (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201 (same); N.H. Rev. Stat. §§ 630:5(VI)(b) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(c) (same); Ky. Rev. Stat. §§ 532.025(b)(6) (defendant "acted under duress or under the domination of another person even though the duress or domination [is] not sufficient to constitute a defense to the crime"); MD. Code Ann. Crim. Law §§ 2-203(2)(iii) (defendant "acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution"); 42 Pa. Cons. Stat. §§ 9711(e)(5) (defendant "acted under extreme duress, although not such duress as to constitute a defense to prosecution . . ."); 18 U.S.C. §§ 3592(a)(3) (defendant's participation in the crime was "relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(3) (same); Ariz. Rev. Stat. §§ 13-703(G)(3) (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201(4)(d) (same); Conn. Gen. Stat. Ann. §§ 53a-46a(h)(4) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(d) (same); Ky. Rev. Stat. §§ 532.025(b)(4) (defendant committed offense "under circumstances that [he] believed to provide a moral justification or extenuation for his conduct even though [such circumstances] are not sufficient to constitute a defense to the crime").

By contrast, the Fifth Circuit's "nexus" requirement in its strictest form demands that the defendant prove facts that would effectively relieve him of *any* criminal liability for the offense, or render him legally *ineligible* for a particular penalty.

entitled to have his mitigating evidence of emotional and psychological problems considered by the sentencer because he apparently "knew the difference between right and wrong" – satisfying "the test of criminal responsibility" – and his turbulent family background did not "excuse" his crime. 455 U.S. at 113. Because the state court had considered as mitigating "only that evidence . . . which would tend to support a legal excuse from criminal liability," the Court held that it had "violated the rule in *Lockett*." *Id.* at 114.[27]

Finally, even if the Fifth Circuit's analysis could withstand Eighth Amendment scrutiny where other types of mitigating evidence are involved, it can no longer be sustained after *Atkins v. Virginia*, 536 U.S. 304 (2002), with respect to Mr. Tennard's evidence of impaired intellectual functioning. *Atkins* recognizes a broad consensus that the very condition of mental retardation is invariably mitigating, so that no defendant with such a condition can be deemed culpable enough to suffer the death penalty. As the Court explained in *Atkins*, "today our society views mentally retarded offenders as *categorically less culpable* than the average criminal," and, while mentally retarded capital defendants' impairments "do not warrant an exemption from criminal sanctions . . . they *do diminish* their personal culpability." 536 U.S. at 316, 318 (emphases added). The Court's language – describing a condition which renders a defendant "categorically less culpable," and which "does" (rather than, *e.g.*, "could" or "might") diminish the defendant's personal culpability – reflects an

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[27] The Court expressly reiterated this portion of *Eddings*' holding eight years later in *McKoy*. *See McKoy*, 494 U.S. at 441 (rejecting the notion that evidence is "irrelevant to mitigation [where it does] not support a legal excuse from criminal liability"; "such evidence [is] undoubtedly relevant to mitigation even if it d[oes] not *excuse* the defendant's conduct") (citation omitted).

understanding that a defendant's impaired intellectual functioning has an *inherently* mitigating relationship to his offense. At a minimum, that must be the case where the defendant's IQ, like Mr. Tennard's, is so low that it falls within the range consistent with a finding of mental retardation. The Fifth Circuit erred on original submission in applying to Mr. Tennard its pre-*Atkins* decisions demanding strict proof of a "nexus" between low intelligence and his crime.[28] It repeated its error on remand from this Court after *Atkins* when it failed to recognize that those opinions can no longer stand.

V. THE FIFTH CIRCUIT ERRED IN DENYING MR. TENNARD A CERTIFICATE OF APPEALABILITY (COA), AND THIS COURT SHOULD DECIDE THE MERITS OF HIS *PENRY I* CLAIM.

In the preceding sections of this brief we have shown (1) that in denying Mr. Tennard a certificate of appealability the Fifth Circuit invoked its generic "uniquely severe condition" and "nexus" rules for resolving claims of constitutional sentencing error under *Penry I*; and (2) that those rules are fundamentally wrong. It follows *a fortiori* that the decision

[28] *See, e.g., Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996) (rejecting a *Penry* claim based on "borderline intelligence" due to "lack of nexus between the mitigating evidence and the criminal act," and observing in a footnote that while Harris' counsel "[a]t oral argument . . . vigorously contended that *a nexus is inherent* between any evidence of mental retardation and a crime, thus obviating a need for any additional showing," "*[o]ur precedents require otherwise*") (emphases added; citations omitted); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir. 1999) (same, citing *Harris* and *Davis v. Scott*, 51 F.3d 457, 462 (5th Cir. 1995)); *Lackey v. Scott*, 28 F.3d at 489 (holding that there was no need for an additional instruction on mitigation because the evidence did not suggest that Lackey's crime "was attributable to his low intelligence or childhood abuse").

below cannot be upheld consistently with the standards for issuance of COA's reaffirmed by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Not only could "jurists of reason . . . disagree with the district court's resolution of [Mr. Tennard's] constitutional claims," *id.* at 1034 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), but those who disagreed would be correct on the merits.

Since the Fifth Circuit's rules underlying the decision below are incorrect and must fall when reviewed both in Mr. Tennard's case and in the companion case of *Smith v. Dretke* – where the Court of Appeals reached the merits in form as well as in substance – it is neither necessary nor appropriate to send Mr. Tennard's case back to the Court of Appeals for the second time in two years. *See* 28 U.S.C. § 2106. Mr. Tennard is already overdue for relief from his unconstitutional sentence of death; and now that the Fifth Circuit jurisprudence occluding his *Penry I* claim has been brought before this Court and shown to be ill-founded root and branch, he should receive that relief without further delay.

CONCLUSION

Mr. Tennard's death sentence offends *Penry I* and should be vacated.

Respectfully submitted,

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In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fifth Circuit correctly denied a certificate of appealability to review the district court's holding that, pursuant to 28 U.S.C. § 2254(d)(1), Tennard failed to prove that the state court's denial of his Eighth Amendment claim based on *Penry v. Lynaugh*, 492 U.S. 302 (1989), was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent.

II. Whether this Court's intervening decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), undermines the propriety of the Fifth Circuit's denial of a certificate of appealability to review the district court's application of 28 U.S.C. § 2254(d) & (e) to the state court's rejection of Tennard's Eighth Amendment jury instruction claim.

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BRIEF OF RESPONDENT

This Court should affirm the lower court's decision denying a certificate of appealability ("COA") because Petitioner Robert James Tennard ("Tennard")[1] fails to show that jurists would debate the reasonableness of the state court's rejection of his Eighth Amendment claim. The Court of Criminal Appeals of Texas identified the correct United States Supreme Court authority and reasonably applied it to Tennard's claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), when it determined that Tennard's jury was not altogether prevented from considering his IQ score and truthfully answering the punishment phase special issues in such a way that Tennard would receive a sentence of life imprisonment. Moreover, this Court's intervening decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), is irrelevant to the instant controversy because it was not clearly established federal law at the time the state court decided Tennard's *Penry I* claim. Similarly, any application of the substantive rule of *Atkins* to the procedural concept of *Penry I* would require the retroactive employment of a new rule of law in violation of *Teague v. Lane*, 489 U.S. 288 (1989). As a result, habeas corpus relief is not available to Tennard.

[1] Respondent Doug Dretke will be referred to herein as "the Director." "JA" refers to the joint appendix, followed by page numbers. "PA" refers to the appendices to Tennard's petition for writ of certiorari, followed by a tab number and page numbers.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals accurately summarized the evidence of Tennard's guilt in its opinion on direct appeal:

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marihuana with the eventual victims, Larry Neblett and Chester Smith, for about half an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand.[2] [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims. Later that evening, the three men arrived at the home of Fred Stewart and Ruby Montgomery. [Tennard] enlisted Stewart to help sell the proceeds of the

[2] In its opinion on state habeas review, the Court of Criminal Appeals noted that "[Tennard] stabbed [Neblett] fifteen times with a knife." JA:80.

> robbery.[3] Stewart testified that [Tennard] gave him a couple of gasoline credit cards which he used to purchase gasoline. Stewart was arrested for the unauthorized use of the credit cards, and this ultimately resulted in [Tennard]'s arrest.

Tennard v. State, 802 S.W.2d 678, 679 (Tex. Crim. App. 1990). On October 6, 1986, Tennard was convicted of murder during the course of a robbery, a capital offense. *Id.*; Tr 165.[4]

II. Facts Relating to Punishment

The Court of Criminal Appeals also summarized the evidence supporting the jury's sentencing verdict in its state habeas opinion:

> The evidence from the punishment hearing shows [Tennard] had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified [Tennard] and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, [Tennard], who was displaying about a foot-and-a-half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."

[3] The state court also found that "[Tennard] played a dominant role in disposing of the victims' stolen property." JA:80.

[4] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, followed by page numbers. "SF" refers to the statement of facts – the transcribed trial proceedings – preceded by volume number and followed by page numbers.

The victim testified [Tennard] and his friends took her to an abandoned apartment at some government project where [Tennard] forced her to engage in oral, vaginal and anal sex with him. After that, [Tennard]'s two friends took turns sexually assaulting her.

[Tennard] and his friends then took the victim to another house where [Tennard] began using drugs and discussing "pimping out" the victim.[5] She asked [Tennard] if she could go to the bathroom to take a bath, which he allowed her to do:

> Q. Now you told them that you wanted to take a bath?
>
> A. Yes, I did.
>
> Q. Did [Tennard] say anything?
>
> A. He told me I wasn't going to try to run away, was I.
>
> Q. What did you tell him?
>
> A. I told him, "No, baby. I like you. I wouldn't do that."

After [Tennard] let the victim go to the bathroom, she escaped through a window, and [Tennard] was arrested later that day.[6] The victim testified

[5] The victim testified that Tennard ingested pills and marijuana until he was "high." JA:15, 24.

[6] After her escape, the victim summoned the police and identified the house where she left Tennard. JA:17-18; 29 SF 48-50. At that moment, Tennard was observed leaving in a car which he subsequently abandoned and was apprehended minutes later on foot. JA:18; 29 SF 51-52, 54.

[Tennard] appeared to be the leader during her ordeal. [Tennard] impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of [Tennard]'s friends was the leader.

[Tennard]'s parole officer testified that a Texas Department of Correction's (TDC) record from [Tennard]'s incarceration for the rape conviction indicated he had a 67 IQ.

> Q. . . . And did you in fact bring a documentation of what [Tennard's] intelligence quotient is according to the test from the penitentiary?
>
> A. Yes, I did.
>
> Q. And what was the result of the test?
>
> A. It's a 67, sir.

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before [Tennard] committed this offense, and there is a notation on the record indicating [Tennard] had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

> Q. Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?
>
> A. No, sir.
>
> Q. It's basically just sort of, as its says, social and criminal history of [Tennard]?
>
> A. Right, sir.

Q. And it says, there's basically a line for IQ, and it says 67?

A. That's correct.

Q. And it has no indication of who may have given those tests or under what conditions?

A. No sir, it doesn't.

This is *all* the evidence presented at [Tennard]'s 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. [Tennard] also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

During closing arguments at the punishment phase, the prosecutor argued the facts of the crime itself showed [Tennard]'s "special dedication to violence."

> Look at the facts of the crime itself. You know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times.

[Tennard] referred to the IQ evidence twice during closing arguments at punishment. He referred to the evidence in responding to portions of the rape victim's testimony:

> . . . the information that they gave is that [Tennard] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work

> that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.

And, he asked the jury to take into account the IQ evidence in answering the special issues:[7]

> . . . none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers.

JA:81-84 (emphasis in original, internal quotations omitted).

At the conclusion of the punishment phase on October 7, 1986, Tennard was sentenced to death. JA:69-71.

III. Direct Appeal and Postconviction Proceedings in State Court

Tennard's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari review. *Tennard v. State,* 802 S.W.2d at 686, *cert. denied,* 501 U.S.

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[7] Two special issues concerning deliberateness and future dangerousness were submitted to the jury. JA:66-70; *see also* TEX. CODE CRIM. PROC. art. 37.071 § 2(b) (West 1984). A third special issue concerning provocation was not raised by the evidence and, thus, was not submitted. JA:66-70.

1259 (1991). On April 7, 1992, Tennard filed an application for habeas relief in state court asserting that the jury was unable to give mitigating effect to his IQ of 67 in violation of *Penry I*. SHTr 6-11.[8] The trial court[9] considered Tennard's claim and found that, although Tennard's lone IQ score was presented to the jury, "no evidence was presented to the jury regarding what an 'IQ' is or what a 'normal' IQ is." JA:73. The court also found that "no evidence was presented as to what an IQ of 67 meant to [Tennard]," or "when or where the IQ test was administered to [Tennard] or if more than one IQ test was administered." JA:73. Further, the court noted that there was no evidence of the score's reliability and "no scientific or medical explanation of [Tennard]'s IQ." JA:73.

Additionally, the court found that Tennard had worked at a temporary employment agency, effectively used the city bus system, possessed "a basic understanding of business and the value of items" and "a significant ability to reason," was "capable of accepting responsibility," and filed seven *pro se* motions prior to trial which "illustrate[d his] cognitive ability." JA:74-75. The court also explained that Tennard did not demonstrate an inability "to learn from his mistakes" or that he was brain damaged. JA:75-76.

[8] "SHTr" refers to the state habeas transcript – the transcript of pleadings and documents filed with the court during state habeas proceedings – followed by page numbers.

[9] The state district judge who adjudicated Tennard's *Penry I* claim was the same judge who presided over Tennard's capital murder trial. *Cf.* JA:68, 78.

The Court of Criminal Appeals then heard oral argument and held that Tennard did not meet the requirements for a diagnosis of mental retardation as defined by the American Association on Mental Retardation ("AAMR") or the relevant Texas law, TEX. HEALTH & SAFETY CODE § 591.003. JA:85-88. The state court reasoned that, "[b]ecause of their unreliability in determining mental retardation, IQ scores should not be used as a 'unitary measure of mental retardation.'" JA:87. Under the commonly accepted three-part definition, *i.e.*, "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period," Tennard's "low IQ score, standing alone, does not meet this definition." JA:85-88. The court concluded that there was "no evidence in this record that [Tennard] is mentally retarded." JA:88.[10]

[10] The state habeas opinion was a plurality opinion in which four of the nine Court of Criminal Appeals judges joined. However, six judges in total reached the same conclusion on the issue of mental retardation. As Judge Meyers explained:

> The evidence presented at [Tennard]'s trial did not show that [he] was mentally retarded as the [AAMR] or the [American Psychiatric Association] has defined it. There was no testimony regarding when [Tennard]'s IQ was measured or what tests were used to measure it. There was no testimony as to the range of IQ or what is considered mentally retarded. There was no testimony or notation on the parole record that [Tennard] was mentally retarded. And, the record is devoid of any evidence indicating that [Tennard]'s adaptive functioning was that of a mentally retarded individual.

JA:101-02 (Meyers, J., concurring, joined by Price, J.).

The state court then applied *Penry I* in an effort to determine whether Tennard's jury was precluded from considering and giving effect to his IQ evidence. JA:88-92. The court first cited the relevant Supreme Court jurisprudence:

> The issue in cases like this is "whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence." *See Johnson* [*v. Texas*], 509 U.S. [350,] 367-71 [(1993)]. We should evaluate the instructions with a "commonsense understanding of the instructions in the light of all that has taken place at trial." *See* [*id.*] at 367-69 []. This involves a case-by-case approach requiring a consideration of the specific facts of each case. And, this is the approach the Supreme Court followed in *Penry* [*I*]. [] 492 U.S. at 307-14, 320-330 []. There are no bright-line rules in cases like this.

JA:89 (internal quotations omitted).

The state court noted that, in *Penry I,* the evidence suggested that Penry was unable to learn from his mistakes, to control his impulses, or to evaluate the consequences of his conduct. JA:89-90 (citing *Johnson,* 509 U.S. at 363-65, *Graham v. Collins,* 506 U.S. 461, 473-75 (1993), and *Penry I,* 492 U.S. at 307-09, 320-30). As a result, Penry's mitigating evidence was relevant only as an aggravating factor in answering the special issue on future dangerousness. JA:90 (citing *Johnson,* 509 U.S. at 363-65, and *Penry I,* 492 U.S. at 322-24). The Court of Criminal Appeals then distinguished the instant case and held that Tennard's 67 IQ was not solely aggravating. JA:91. Rather, the court explained that the jury could have determined that Tennard's conduct was less than deliberate as result

of his IQ, or it could have found that Tennard was a "follower" rather than a "leader" during his criminal activities, or that he acted under duress or domination of his co-defendants, suggesting he would not be dangerous in a structured prison environment. JA:91. On December 18, 1997, the court denied habeas corpus relief and, thereafter, this Court declined to grant a writ of certiorari. JA:92; *Ex parte Tennard,* 960 S.W.2d 57, 63 (Tex. Crim. App. 1997), *cert. denied,* 524 U.S. 956 (1998).

IV. Federal Habeas Proceedings

Tennard raised the same *Penry I* claim in his federal habeas petition, filed on December 18, 1998. JA:1. Applying the deferential scheme contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court concluded that the state trial court's factual findings concerning Tennard's lack of mental retardation were "fully supported by the evidence." JA:124, 128-29. The district court also held that the state court's decision applying *Penry I* was "consistent with the law." JA:129-30. As a result, the district court granted summary judgment in favor of the Director and denied habeas relief on July 25, 2000. JA:1-2, 132; *Tennard v. Johnson,* No. H-98-4238 (S.D. Tex. 2000) (unpublished opinion). The court also denied a COA. JA:2-3.

Tennard subsequently requested a COA in the Fifth Circuit regarding his *Penry I* claim. JA:3. On March 1, 2002, the court of appeals declined to issue a COA. JA:3; PA2:5; *Tennard v. Cockrell,* 284 F.3d 591, 597 (5th Cir. 2002). The lower court explained that, "although defense counsel presented evidence of Tennard's low IQ, he did not argue that Tennard was mentally retarded." PA2:4. Thus,

Tennard failed to rebut the state court's presumptively correct finding that there was no evidence of mental retardation. PA2:4-5. The court below also held that, under circuit precedent, Tennard's IQ score was not beyond the effective reach of the jury in answering the special issues. PA2:5 (citing *Boyd v. Johnson,* 167 F.3d 907, 912 (5th Cir. 1999), *Harris v. Johnson,* 81 F.3d 535, 539 & n.11 (5th Cir. 1996), *Lackey v. Scott,* 28 F.3d 486, 489-90 (5th Cir. 1994), and *Andrews v. Collins,* 21 F.3d 612, 629-30 (5th Cir. 1994)). The court of appeals denied Tennard's petition for rehearing *en banc*. JA:4.

This Court then granted Tennard's petition for writ of certiorari, vacated the Fifth Circuit's opinion denying a COA, and remanded "for further consideration in light of *Atkins v. Virginia.*" *Tennard v. Cockrell,* 537 U.S. 802 (2002). On remand, the lower court reinstated its prior opinion on January 3, 2003, declining to address any claim based on *Atkins* because Tennard never before argued that the Eighth Amendment prohibited his execution on the basis of his putative mental retardation. JA:4; PA1:1; *Tennard v. Cockrell,* 317 F.3d 476, 477 (5th Cir. 2003). This Court again granted a writ of certiorari on October 14, 2003. *Tennard v. Dretke,* 124 S. Ct. 383 (2003).

SUMMARY OF THE ARGUMENT

The Fifth Circuit properly denied a COA concerning Tennard's *Penry I* claim because it is not debatable that the Court of Criminal Appeals reasonably applied *Penry I* and its progeny in determining that his jury was not altogether prevented from considering his IQ score and truthfully answering the punishment phase special issues

in such a way that Tennard would receive a sentence of life imprisonment. Indeed, the state court correctly engaged in the kind of case-by-case analysis of the evidence dictated by *Penry I* and required under its own extensive *Penry I* jurisprudence. The court first determined the mitigating impact of the IQ score presented during Tennard's punishment trial, then ascertained whether the deliberateness and future dangerousness special issues provided the jury with a vehicle to give that evidence *some* mitigating effect. In this case the IQ score had meaningful relevance to both special issues because Tennard argued to the jury that he was merely a follower and committed his crimes under the domination of his co-defendants. The fact that Tennard might be able to identify additional mitigating relevance outside the scope of the special issues is immaterial to the instant *Penry I* analysis, and does not undermine the reasonableness of the state court's denial of relief.

Finally, the Court's recent opinion in *Atkins* is immaterial to Tennard's case because it was not clearly established federal law when the Court of Criminal Appeals considered Tennard's *Penry I* claim. Consequently, it may not be considered in assessing the reasonableness of the state court's decision under 28 U.S.C. § 2254(d)(1). Likewise, any extension of the substantive rule of *Atkins* to a procedural *Penry I* claim would necessitate the retroactive application of a new rule of law in violation of *Teague.* Because Tennard fails to establish that any exception to *Teague* applies, habeas corpus relief is not available and the Fifth Circuit's denial of COA must be affirmed.

ARGUMENT

I. Standard of Review

Tennard's right to appeal is governed by the COA requirement of 28 U.S.C. § 2253(c). *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). To satisfy this requirement, Tennard is obligated to make a substantial showing of the denial of a constitutional right, *i.e.,* "reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have resolved the claims in a different manner, "or that the questions are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003) (quoting *Slack,* 529 U.S. at 483-84); *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983). This determination "requires an overview of the claims in the habeas petition and a general assessment of their merits" but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El,* 537 U.S. at 336.

Because Tennard alleges a *Penry I* violation, "resolution of his COA application requires a preliminary, though not definitive, consideration of the [rule] mandated by [*Penry I*] and reaffirmed in [the Court's] later precedents," and "whether the District Court's application of AEDPA deference" to Tennard's claim was debatable among reasonable jurists. *Miller-El,* 537 U.S. at 338, 341. The AEDPA provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[11]

28 U.S.C. § 2254(d) (West 2003).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). Here, where the state court correctly identified the controlling Supreme Court precedent, the unreasonable application test of § 2254(d)(1) applies. *Id.* at 406-08. A state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court

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[11] Where, as here, Tennard does not dispute the underlying fact that he is not mentally retarded, § 2254(d)(2) is inapplicable. *Price v. Vincent,* 123 S. Ct. 1848, 1853 (2003).

should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002).

Although Tennard does not dispute the state court's finding that he is not mentally retarded, the AEDPA provides that this determination "shall be presumed to be correct" unless the petitioner carries "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Finally, "in addition to performing any analysis required by the AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the [S]tate." *Horn v. Banks,* 536 U.S. 266, 272 (2002).

II. The Court of Appeals Properly Denied a COA Because it Is Not Debatable That the Court of Criminal Appeals Reasonably Applied *Penry I* in Denying Habeas Relief.

Tennard vigorously and extensively attacks the Fifth Circuit's longstanding *Penry I* jurisprudence as "misconceived," unsupported by Supreme Court precedent, arbitrary, and overly "rigid." Brief of Petitioner ("Brief") at 11-12, 24-47. However, Tennard entirely fails to acknowledge the AEDPA and the fact that it is the state court's application of *Penry I* that is at issue here. As shown below, the Court of Criminal Appeals correctly identified *Penry I* as

the controlling Supreme Court authority concerning Tennard's Eighth Amendment claim and reasonably applied that precedent in denying relief. JA:88-92. Thus, it cannot be demonstrated that the lower courts improperly denied a COA.

A. Where the constitutionality of the Texas special issues is challenged, *Jurek*, *Eddings*, and *Penry I* dictate a case-by-case inquiry into the mitigating significance of the evidence presented and whether the jury was altogether prevented from giving effect to that evidence within the scope of the special issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital sentencing authority be allowed to consider mitigating circumstances), *Jurek v. Texas,* 428 U.S. 262, 276 (1976) (explaining that the pre-1991 Texas special issues – deliberateness and future dangerousness – allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise that both this Court, the Fifth Circuit, and the Court of Criminal Appeals have repeatedly refused to extend to other types of mitigating evidence.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to

adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04. As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n. 2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance,

and remorse.[12] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps,* 484 U.S. 231, 245 (1988), and in *Franklin,* 487 U.S. at 182. Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse.[13] 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able . . . to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future dangerousness special issue only as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324.

During its next term, however, the Court held that a mere possibility that the jury was precluded from considering relevant mitigating evidence did not establish Eighth Amendment error. *Boyde v. California,* 494 U.S. 370, 380 (1990). Rather, such error occurred only if there

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[12] Tennard fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham,* 506 U.S. at 474-77 (explaining that *Penry I* is the exception to *Jurek*).

[13] Penry's evidence suggested that he was mildly or moderately retarded, may have suffered traumatic damage to his brain at birth or as a result of later injuries, and was frequently beaten about the head and locked in his room as a child. *Penry I,* 492 U.S. at 307-09. The Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19.

was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.* The Court further limited its holding in *Saffle v. Parks,* 494 U.S. 484 (1990), applying *Teague*[14] to preclude relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence. *Id.* at 490-92. Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not solely aggravating when viewed through the lens of the special issues.

For example, in *Graham,* the Court imposed a *Teague* bar and declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence – "that his brief spasm of criminal activity . . . was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" – from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable

[14] The Court had previously found that *Teague* did not bar the relief sought in *Penry I,* because Penry merely requested vindication of his Eighth Amendment rights under *Eddings* as required by the evidence presented "*in his particular case.*" *Penry I,* 492 U.S. at 318-19 (emphasis in original). This holding unequivocally did "not 'impos[e] a new obligation' on the State of Texas." *Id.* at 319 (quoting *Teague,* 489 U.S. at 301).

relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

The same term, the Court reconsidered a *Graham*-type challenge to the special issues on direct appeal, where it was not bound by *Teague. Johnson,* 509 U.S. at 352. In *Johnson,* the Court again concluded that "[i]t strains credulity to suppose that the jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future dangerousness] special issue." *Id.* at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Thus, the Court has clearly mandated a case-by-case inquiry into the nature of the mitigating evidence presented in Texas cases in order to determine whether there is any reasonable likelihood the jury was prevented from giving effect to that evidence when answering the special issues.

B. The Court of Criminal Appeals reasonably analyzed Tennard's mitigating evidence under the foregoing precedent.

Following *Penry I,* death-sentenced inmates in Texas have repeatedly claimed that the former capital sentencing scheme prevented the consideration of various types of mitigating evidence, "including but not limited to subnormal intelligence, youth, troubled or abused childhood, intoxication, substance abuse, head injury, good character, mental illness, antisocial personality disorders, and dyslexia." *Robertson v. Cockrell,* 325 F.3d 243, 249-50 (5th Cir.) (*en banc*) (footnotes omitted), *cert. denied,* 124 S. Ct.

28 (2003). In numerous decisions, the Court of Criminal Appeals developed a "coherent rationale," based on this Court's decisions, for analyzing the mitigating significance of different types of evidence to determine whether a *Penry I* violation occurred. *Robison v. State,* 888 S.W.2d 473, 487 (Tex. Crim. App. 1994); *see also, e.g., Mines v. State,* 888 S.W.2d 816, 820 & n.5 (Tex. Crim. App. 1994) (cataloging mitigating evidence deemed within and outside the scope of the special issues) (opinion on remand) (Baird, J., concurring); *Earhart v. State,* 877 S.W.2d 759, 764-65 (Tex. Crim. App. 1994) (same).

1. The state court developed a reasonable structure for adjudicating *Penry I* claims.

In considering *Penry I* claims, "the pertinent inquiry is and has been, by what principle should the line between *Penry I* and non-*Penry I* evidence be drawn?" *Robertson,* 325 F.3d at 251. As the Court of Criminal Appeals has noted, a case-by-case approach is necessary because "[t]here are no bright-line rules in cases like this." *Ex parte Tennard,* 960 S.W.2d at 62. First, it is important to recognize that not all evidence produced by a defendant during the punishment phase of a capital murder trial actually reduces his or her "moral culpability" in a significant way. For example, in order to establish Eighth Amendment error under *Penry I,* any disability claimed as mitigating must be involuntary in nature.[15] *Miniel v. State,*

[15] Fifth Circuit precedent has paralleled the state court's treatment of *Penry I* claims in many ways, including the requirement of involuntariness. *See Robertson,* 325 F.3d at 251 ("The principle of voluntariness

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831 S.W.2d 310, 320-21 (Tex. Crim. App. 1992). Voluntary intoxication or drug addiction would neither "diminish [the defendant]'s moral culpability or blameworthiness," nor fall outside the jury's effective reach in answering the deliberateness special issue. *Id.* at 321; *see also, e.g., Rousseau v. State,* 855 S.W.2d 666, 671-72 (Tex. Crim. App. 1993); *Nobles v. State,* 843 S.W.2d 503, 507-08 (Tex. Crim. App. 1992); *Ex parte Kelly,* 832 S.W.2d 44, 47 (Tex. Crim. App. 1992); *Lane v. State,* 822 S.W.2d 35, 39 (Tex. Crim. App. 1991); *Ex parte Ellis,* 810 S.W.2d 208, 211-12 (Tex. Crim. App. 1991). A person who voluntarily engages in proscribed conduct such as drug abuse is not less culpable for their crimes in the eyes of society as is someone who is involuntarily burdened with the pain of an abused childhood or the difficulties of mental retardation. *See Penry I,* 492 U.S. at 307-09 (suggesting Penry's mental retardation and brain damage may be the result of child abuse or birth defect); *cf., e.g., Barnard v. Collins,* 958 F.2d 634, 639 (5th Cir. 1992).

Second, the mitigating circumstances must be continuing, long-term, or permanent in nature to be relevant to culpability *and* outside the scope of the special issues.[16] *Nobles,* 843 S.W.2d at 506; *Joiner v. State,* 825 S.W.2d 701, 707 (Tex. Crim. App. 1992). In this context, evidence of "sporadic and isolated" childhood mistreatment or of a

is found in the Court's insistence on the defendant's constitutional right to a thorough assessment of his "culpability") (citing *Penry I,* 492 U.S. at 319).

[16] A showing of permanence is also required by the Fifth Circuit. *See Robertson,* 325 F.3d at 251 ("Permanence is derived from the fixed biological character of Penry's evidence") (citing *Penry I,* 492 U.S. at 307-09).

single psychiatric hospitalization could be given mitigating effect in answering the future dangerousness special issue negatively, because the defendant's conduct could be reasonably viewed as aberrant in nature and something not likely to be repeated. *Nobles,* 843 S.W.2d at 505-06; *Goss v. State,* 826 S.W.2d 162, 166-67 (Tex. Crim. App. 1992), *overruled on other grounds, Barnes v. State,* 876 S.W.2d 316 (Tex. Crim. App. 1994); *Joiner,* 825 S.W.2d at 706-07. A mental illness which is treatable or controllable with medication does not equate to mental retardation, which is permanent in nature, because "one's level of intelligence 'should be a relatively stable factor throughout one's life.'" *Rios v. State,* 846 S.W.2d 310, 315 (Tex. Crim. App. 1992); *see also, e.g., Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir.), *cert. denied,* 534 U.S. 1043 (2001); *cf. Penry I,* 492 U.S. at 323-24 (suggesting Penry's mental retardation and brain damage indicated he would be a permanent danger to others).

Third, the mitigating evidence must be sufficiently severe, or "of the same quality and character" as the evidence presented in *Penry I* to be significantly outside the scope of the special issues.[17] *Delk v. State,* 855 S.W.2d 700, 709 (Tex. Crim. App. 1993); *Goss,* 826 S.W.2d at 166-67; *Trevino v. State,* 815 S.W.2d 592, 620-22 (Tex. Crim. App. 1991), *remanded on other grounds,* 503 U.S. 562 (1992). As the Court of Criminal Appeals explained in *Trevino,* the severity inquiry is necessary because the mitigating evidence must be related to some "aspect of how or why death in this case would or would not be an

[17] Severity must also be demonstrated under Fifth Circuit precedent. *Robertson,* 325 F.3d at 251-52.

appropriate response." 815 S.W.2d at 622. Because *Penry I* "implicitly reaffirmed the facial constitutionality of the Texas death penalty laws," holding that "the slightest bit of good character testimony" amounted to *Penry I* error in every case would be inconsistent with the special issues' constitutionality. *Id.* In *Lewis v. State,* for example, the court rejected a *Penry I* claim based on evidence that Lewis often had bruises and did not have "a happy childhood" because it was insufficiently severe. *Lewis v. State,* 815 S.W.2d 560, 567 (Tex. Crim. App. 1991); *see also, e.g., Madden v. Collins,* 18 F.3d 304, 308 (5th Cir. 1994). In contrast, the court found the requisite severity and granted relief where the evidence established that the defendant "was beaten with a broom and an extension cord, to the point where physical scars remained," and where "[t]estimony from expert witnesses presented at trial indicated that he suffered severe emotional problems as a result of the abuse." *Ex parte McGee,* 817 S.W.2d 79, 79-80 (Tex. Crim. App. 1991).

Finally, there must be a "connection between the [mitigating evidence] and the commission of the crime."[18]

[18] The "nexus" requirement is also a part of Fifth Circuit jurisprudence and arises "from the Court's belief that Penry, like other defendants whose 'criminal acts ... are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Robertson,* 325 F.3d at 252 (quoting *Penry I,* 492 U.S. at 319) (internal quotations omitted). Contrary to Tennard's argument, Brief at 35-36, the Fifth Circuit always allowed an *inference* of causation to support a nexus showing. As the lower court explained, nexus merely requires a showing by the habeas petitioner on collateral review that a causal connection may be inferred from the trial evidence. *See, e.g., Smith v. Cockrell,* 311 F.3d 661, 680-81 (5th Cir. 2002) (citing *Davis v. Scott,* 51 F.3d 457, 460-61 (5th Cir. 1995), *Russell v. Collins,* 998 F.2d 1287, 1292 (5th Cir. 1993),

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Nobles, 843 S.W.2d at 506; *Goss,* 826 S.W.2d at 166; *Trevino,* 815 S.W.2d at 621-22. "Without such a connection, the evidence offered was not helpful to the jurors' determination of . . . moral blameworthiness." *Nobles,* 843 S.W.2d at 506. For example, in *Richardson v. State,* the court explained how the lack of a nexus limited the mitigating relevance of the evidence:

> . . . [Richardson] has made no showing that, from the viewpoint of society as a whole, his alleged childhood experience of poverty, parental neglect, illiteracy, and a speech disorder tends to excuse his capital crime. He has also made no showing that the alleged fact that his mother taught him to shoplift tends to excuse his capital crime.
>
> * * *
>
> Our conclusion might be different if [Richardson] had presented evidence that his mother had taught him to kill or commit other crimes of violence, or if his capital crime had begun as a robbery. Such evidence might, from the viewpoint of society as a whole, tend to excuse [Richardson]'s criminal behavior in that it might indicate that his personality had been damaged through no fault of his own and that his capital crime was caused in part by that damaged personality.

879 S.W.2d 874, 884-85 (Tex. Crim. App. 1993).

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and *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*)), *cert. granted,* 124 S. Ct. 46 (2003).

As the court noted, without such a requirement, "a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which death is imposed from the cases in which it is not." *Richardson,* 879 S.W.2d at 884 n.11; *see Parks,* 494 U.S. at 493 ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"); *Brown,* 479 U.S. at 542-43 (holding instruction telling the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" during the sentencing phase did not violate the Eighth Amendment).[19]

It is important to note that in cases involving legitimate evidence of mental retardation, the Court of Criminal Appeals consistently held that a nexus is *automatically established. Earhart,* 877 S.W.2d at 765 n.9. In fact, the court granted relief based on *Penry I* in numerous such cases. *See, e.g., Rios,* 846 S.W.2d at 315-17 (mental retardation); *Richard v. State,* 842 S.W.2d 279, 281-83 (Tex. Crim.

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[19] Tennard essentially admits that such a connection must exist when he suggests that the jury's reasoned moral response must be the result of an assessment of the facts of each particular case. Brief at 40. And his reliance on *Payne* is disingenuous at best. *Id.* at 41. In *Payne,* the Court explained that it would be unfair to hold that the Eighth Amendment prohibits the State from presenting victim impact testimony, which is relevant to the circumstances of the crime, where the defendant is allowed to present mitigating evidence whether it is relevant to the circumstances of the crime or not. 501 U.S. at 825-26. The inquiry of relevance for the purposes of admissibility is quite different from the *Penry I* inquiry.

App. 1992) (mental retardation, severe child abuse, mental illness); *Ex parte Williams,* 833 S.W.2d 150, 151-52 (Tex. Crim. App. 1992) (mental retardation); *McGee,* 817 S.W.2d at 79-80 (severe child abuse, mental retardation); *Ex parte Goodman,* 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991) (mental retardation, child abuse, brain damage); *Ramirez v. State,* 815 S.W.2d 636, 654-55 (Tex. Crim. App. 1991) (mental retardation, child abuse). In one case involving severe sexual abuse, the court granted relief because expert testimony established a nexus to the defendant's psychosis and sexually sadistic crimes. *Gribble v. State,* 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990).

In each of these cases, the mitigating evidence established an involuntary, permanent, and severe disability that was directly connected to the crime.[20] Mitigating evidence that fails to meet these criteria is not relevant to moral culpability "beyond the scope of the special issues" in violation of *Penry I* because "it tends to show that

[20] For example, in *Richard,* expert testimony established that the defendant's abusive childhood triggered his antisocial personality disorder, which rendered him unable to consider consequences and made it likely that he would engage in criminal behavior. 842 S.W.2d at 281-83. Similarly, in *McGee,* "[t]estimony from expert witnesses ... indicated that [McGee] suffered severe emotional problems as a result of the abuse." 817 S.W.2d at 79-80. Although Tennard makes much of the fact that the Fifth Circuit has granted *Penry I* relief in only one published opinion, Brief at 37 (citing *Blue v. Cockrell,* 298 F.3d 318 (5th Cir. 2002)), it is clear that most meritorious *Penry I* claims have been vindicated in state court, before reaching federal habeas review. Moreover, unlike Tennard, Blue presented "abundant evidence" of "parental abandonment, physical and sexual abuse, minimal brain injury, schizophrenia, and resultant poor impulse control." *Robertson,* 325 F.3d at 253 (citing *Blue,* 298 F.3d at 321-22). Tennard presents nothing other than an unsubstantiated and unexplained IQ score.

special issues should be answered in the negative" and, thus, does not deprive the jury of "a vehicle by which to give effect to that evidence." *Mines v. State,* 852 S.W.2d 941, 951-52 (Tex. Crim App. 1992), *aff'd on remand,* 888 S.W.2d 816; *Felder v. State,* 848 S.W.2d 85, 100 (Tex. Crim. App. 1992). Tennard's evidence of a 67 IQ is similarly within the scope of the special issues.

2. The Court of Criminal Appeals reasonably rejected Tennard's *Penry I* claim.

As discussed above, the state court recognized the double-edged character of Penry's mitigating evidence and the fact that it was only relevant to the special issues as an aggravating factor. JA:89-90. However, the Court of Criminal Appeals also correctly noted that "Supreme Court decisions before and after *Penry* [*I*] have upheld the constitutionality of Texas' former special issues framework because this framework has allowed juries in the vast majority of cases to consider and give effect to relevant mitigating evidence in a meaningful manner." JA:88 (citing *Johnson,* 509 U.S. at 361-67, *Graham,* 506 U.S. at 473-75, *Franklin,* 487 U.S. at 181-82, and *Jurek,* 428 U.S. at 262). "[A]s long as relevant mitigating evidence is within 'the effective reach of the sentencer' the requirements of the Eighth Amendment are satisfied." JA:88 (quoting *Johnson,* 509 U.S. at 367-69). Importantly, "[t]he Constitution does not require that 'a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.'" JA:89 (quoting *Johnson,* 509 U.S. at 367-69).

As the Court of Criminal Appeals reasoned:

> Here, there is no evidence [Tennard]'s low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct. *See Johnson,* 509 U.S. at 363-65 []; *Graham,* 506 U.S. at 473-75 []. Therefore, there was no danger, as in *Penry* [*I*], that the jury would have given any mitigating qualities of the evidence of [Tennard]'s low IQ *only* aggravating effect in answering [the future dangerousness] special issue []. *See Johnson,* 509 U.S. at 363-65, 369-71 []; *Penry* [*I*], 492 U.S. at 322-24 [].
>
> In addition, the special issues did not place mitigating qualities of the evidence of [Tennard]'s low IQ beyond the effective reach of the jury. The jury could have used this evidence for a "no" answer to the first special issue on "deliberateness." *See Penry* [*I*], 492 U.S. at 322-24 []. Moreover, in considering the circumstances of this offense and [Tennard]'s prior felony rape conviction in connection with [the future dangerousness] special issue [], the jury could have used the low IQ evidence to conclude [Tennard] was a "follower" instead of a "leader" since he participated in the commission of both crimes with others. *See, e.g., Ellason v. State,* 815 S.W.2d 656, 660 (Tex. Cr[im]. App. 1991) (one factor to consider in determining whether the evidence is sufficient to support an affirmative answer to [future dangerousness] special issue [] is whether the defendant was acting under duress or the domination of another at the time of the offense); *see also*

> *Johnson,* 509 U.S. at 371-73 []. There was ample room within [the future dangerousness] special issue [] for the jury to give effect to any mitigating qualities of [Tennard]'s low IQ evidence.

JA:91-92.

The circumstances of the crime and whether a defendant was operating under duress or emotional disturbance were explicitly recognized by this Court as factors which could be considered within the scope of the future dangerousness special issue. *Jurek,* 428 F.3d at 272-73. Here, the defense painted Tennard as gullible by virtue of allowing his prior rape victim to escape and relentlessly attacked the State's theory that Tennard was the primary actor in both the rape and the murders. Thus, the jury could have easily viewed Tennard as a follower rather than a leader because of his 67 IQ, and could have given mitigating effect to Tennard's IQ by determining that there was a reasonable doubt whether he would be a future danger once incarcerated in the structured environment of prison and removed from his peer group.

Tennard argues that the jury "could easily have concluded" that his "impaired intellectual functioning" was not relevant to the deliberateness special issue. Brief at 15. Similarly, Tennard suggests that the jury "could reasonably have viewed his low IQ as *aggravating*" under the future dangerousness special issue. *Id.* at 18 (emphasis in original). Although Tennard appears to concede that he is not mentally retarded, he suggests that "[l]ow intelligence manifests itself in impaired judgment, and impaired judgment can lead to involvement in crimes that can be violent." Brief at 23. Yet Tennard never explained this to the jury. Indeed, as the trial court found, Tennard never even explained that an IQ of 67 was particularly low.

JA:73. Nor did Tennard's punishment evidence establish that he was less able to learn from his mistakes, control his impulses, or "to assess the consequences of his behavior [or] to make reasoned, responsible decisions." JA:75-76, 89-92; Brief at 25. Instead, the jury heard that Tennard worked at a temporary employment agency, could use public transportation and drive an automobile, and possessed "a basic understanding of business and the value of items" with which he endeavored to profit from his criminal behavior and dispose of the evidence. JA:18, 74-75; 21 SF 167-70, 174-91, 231-34, 262-63, 291-92; 22 SF 413-33, 447-48; 29 SF 51-52, 54. Tennard also knew enough to wear gloves or socks on his hands to avoid leaving fingerprints at the crime scene. 21 SF 291; 22 SF 342-44, 406, 413. Crucially, Tennard makes no effort to rebut the state court's presumptively correct fact findings that he was neither mentally retarded nor burdened with the commonly understood characteristics of mental retardation.

Nevertheless, the fact that Tennard can identify "*some* arguable relevance beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham,* 506 U.S. at 476 (citing *Franklin,* 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). Tennard must prove more than "the mere possibility" that the jury was prevented from giving effect to his IQ evidence. *Johnson,* 509 U.S. at 367. Thus, the issue is not whether Tennard's 67 IQ had some relevance outside the special issues *but whether the evidence had some relevance within the special issues.* Because Tennard's mitigating evidence

did have such relevance, the state court's adjudication of his *Penry I* claim was not unreasonable.

C. The Fifth Circuit's denial of COA was a proper application of the AEDPA.

As discussed *supra,* the question before the Court is whether the lower court was correct in holding that the district court's denial of relief under the AEDPA was not debatable among reasonable jurists. For the purposes of this inquiry, it is the unreasonable application prong of § 2254(d)(1) that is at issue. Initially, the district court explained that the state courts' finding that Tennard was not mentally retarded was "fully supported by the evidence." JA:128.

> Although Tennard's prison records indicate an old IQ score of 67, Tennard presented no evidence about which test he took, who administered the test, and under what circumstances the test was given. The evidence at trial indicated that Tennard understood the value of the items stolen from Neblett and Smith, recognized the necessity of covering his hands to avoid leaving fingerprints, and understood that he and his friends needed to remove from the murder scene items that might have their fingerprints. The evidence at trial indicated that Tennard gave directions to Bogany and Groom during the murder and in connection with disposing of the stolen property. The evidence supports the finding that Tennard's low score is not necessarily indicative of mental retardation and that Tennard's ability to reason and to accept responsibility indicates that his low IQ score does not interfere with his general intellectual functioning or behavior.

JA:128-29.

Further, the district court held that the state court reasonably decided "the jury in Tennard's case was permitted to give meaningful effect to Tennard's evidence that he has a low IQ score." JA:129. The court noted that trial counsel "argued that Tennard's low IQ affected his ability to act deliberately" and cited, as an example, the fact that Tennard "permitted a prior rape victim to escape through a bathroom window because he believed her when she told him that she would not try to run away if he let her go into the bathroom alone and take a bath." JA:129; *cf.* JA:50-51 (defense counsel arguing that Tennard was not the principal in the prior rape, and that he allowed the victim to escape). The court also found that trial counsel "argued specifically to the jury that they should 'take all these things into consideration, the 67 IQ – in deciding how you answer those questions.'" JA:129 (quoting JA:57). Thus, the court reasoned, Tennard's IQ score was before the jury, "both sides argued its significance for punishment," and the jury was not foreclosed from considering and giving effect to that evidence in answering the special issues. JA:129-30.

The Fifth Circuit adopted this reasoning, adding that Tennard could not demonstrate the debatability or the unreasonableness of the state court's conclusions under § 2253(c)(2) or § 2254(d)(1) because Tennard could not establish that he was mentally retarded or that his IQ diminished his moral culpability in a way not cognizable by the jury in answering the special issues. PA1:5. The Fifth Circuit based its decision on prior precedent holding that evidence of low IQ does not in itself give rise to *Penry I* error, a fact which Tennard protests. Brief at 21-23 (citing *Lackey,* 28 F.3d at 489-90, and *Andrews,* 21 F.3d at 629-30). However, neither case is distinguishable because,

in both cases, there was no evidence that the defendant was mentally retarded or that the defendant's low IQ score would make him dangerous in the future; thus, the evidence was not solely aggravating under the future dangerousness special issue. *Lackey,* 28 F.3d at 289-30; *Andrews,* 21 F.3d at 629-30; *see also Boyd,* 167 F.3d at 912 (holding IQ of 67 derived from prison records, absent showing of mental retardation, did not result in *Penry I* error); *Harris,* 81 F.3d at 539 (rejecting *Penry I* claim based on IQ scores of 68, 71, and 93 and borderline mental retardation diagnoses). Underlying each of these cases is the principle that the IQ score was not relevant to the future dangerousness special issue in an exclusively aggravating way. *See Boyd v. State,* 811 S.W.2d 105, 111-12 (Tex. Crim. App. 1991) (holding Boyd's mitigating evidence "has no significance independent of its relevance to the second special issue"). Importantly, this Court denied certiorari review in each instance. *Boyd v. Johnson,* 527 U.S. 1055 (1999); *Harris v. Johnson,* 517 U.S. 1227 (1996); *Andrews v. Scott,* 513 U.S. 1114 (1995); *Lackey v. Scott,* 513 U.S. 1086 (1995); *Boyd v. Texas,* 502 U.S. 971 (1991).

Even more important than the consistency of the Fifth Circuit's jurisprudence on the application of *Penry I* to low IQ scores is the fact that, in all of the above-cited cases, the court of appeals was engaging in a *de novo* review of the issue under pre-AEDPA law. Thus, the bulk of Tennard's argument, Brief at 24-47, is merely specious.[21]

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[21] As argued *supra,* the Fifth Circuit's *Penry I* jurisprudence is not at issue here. However, the Director believes that, historically, the court of appeals has properly analyzed *Penry I* claims, and that matter is directly at issue in the companion case, *Smith v. Dretke,* 124 S. Ct. 46. In any event, Tennard relies on several distinguishable cases to suggest

(Continued on following page)

Indeed, any opinion from this Court condemning the Fifth Circuit's approach would be necessarily advisory in nature where the *state court* judgment is subject to review only for unreasonableness under § 2254(d)(1).[22] Therefore, the Fifth Circuit's analysis of the underlying facts and application of *Penry I* is largely irrelevant where, as here, it is not debatable that the state court properly and reasonably applied *Penry I* to Tennard's claim and denied relief.

---

that the Fifth Circuit's *Penry I* jurisprudence does not pass constitutional muster. Brief at 29, 41-44 & n.21. However, the facts of *Bell v. Ohio* are not comparable to the instant case because Bell introduced "detailed information" of emotional instability and mental deficiency, and he was not the triggerman in his crime. 438 U.S. 637, 639-41 (1978) (plurality opinion). Both *McKoy v. North Carolina* and *Mills v. Maryland* were reversed because the relevant statute required all twelve jurors to agree on the existence of a mitigating factor before they could give effect to it. *McKoy,* 494 U.S. 433, 444 (1990); *Mills,* 486 U.S. 367, 384 (1988). In *Hitchcock v. Dugger,* the "jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." 481 U.S. 393, 398-99 (1987). And this Court's "rejection" of a nexus requirement in *Williams* pertained only to an evaluation of whether counsel's failure to investigate or present mitigating evidence prejudiced the defendant under *Strickland v. Washington,* 466 U.S. 668 (1984). *Williams,* 529 U.S. at 397-98; *see also Dowthitt v. Johnson,* 230 F.3d at 733, 746 n.15 (5th Cir. 2000) (also "rejecting" a nexus requirement under *Strickland* based on *Williams*).

[22] Additionally, " . . . while it is inappropriate to ascribe undue significance to denials of certiorari, it should at least be noted that the Supreme Court has been loathe to disturb [the Fifth Circuit]'s interpretation of *Penry I,*" and has denied certiorari review in at least thirty-nine such cases. *Robertson,* 243 F.3d at 256.

III. Both the AEDPA and the Non-retroactivity Principle of *Teague v. Lane* Bar this Court from Holding That *Atkins* Renders the State Court's Decision Unreasonable.

Finally, Tennard argues that this Court's recent decision in *Atkins v. Virginia,* 536 U.S. at 321, holding that the Eighth Amendment prohibits the execution of mentally retarded offenders, somehow alters the analysis of his *Penry I* claim. Brief at 47-48. Initially, for the purposes of § 2254(d)(1), *Atkins* was not "clearly established Federal law, as determined by [this Court]," as of the time of the state court's denial of habeas relief. *Williams,* 529 U.S. at 412. Thus, *Atkins* could not render the state court's decision unreasonable unless it also qualifies as an "old rule" under *Teague. Williams,* 529 U.S. at 412. *Atkins* is unquestionably a "new rule" under *Teague, i.e.,* it was not "*dictated* by precedent at the time [Tennard]'s conviction became final" in 1991. 489 U.S. at 301 (emphasis in original). "The question is 'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Goeke v. Branch,* 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (internal quotations omitted)). Here, where the *opposite* conclusion was compelled by *Penry I,* there is no doubt that *Atkins* would be a "new rule." Thus, to the extent Tennard argues that the state court's decision must be re-examined in light of *Atkins,* the AEDPA bars any such relief.

Additionally, Tennard is not entitled to the retroactive application of any new rule of law unless he demonstrates that a *Teague* exception applies. As stated *supra,* "in

addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the [S]tate" because the two inquiries are distinct. *Banks,* 536 U.S. at 272. Under *Teague,* "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1971)). "Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (quoting *Mackey,* 401 U.S. at 693 (internal quotations omitted)). While the rule of *Atkins* falls within the first *Teague* exception because it "plac[es] a certain class of individuals beyond the State's power to punish by death," *Penry I,* 492 U.S. at 330, "Tennard has never argued that the Eighth Amendment prohibits his execution."[23] PA1:1.

The second *Teague* exception does not apply either. Indeed, *Atkins* could no more retroactively alter the rule of *Penry I* than could *Penry I* alter the rule of *Eddings.* This is especially true where *Atkins* does not purport to announce a

[23] Nor could he. As the state court determined, Tennard is not mentally retarded. JA:88. Tennard has never challenged the reasonableness of this determination and has produced no evidence that might rebut this factual finding. In order to properly invoke the jurisdiction of this Court, it is crucial that a federal question not only be raised in prior proceedings, but that it be raised at the proper point. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919). In this context, Tennard should have raised such a challenge in the district court or he should have requested permission to file a successive habeas corpus petition under the "new rule" provision of 28 U.S.C. § 2244(b)(2)(A).

"watershed rule of criminal procedure." *See Atkins,* 536 U.S. at 317, 321 (holding *Atkins* is a *substantive* rule of law, but procedures for implementing *Atkins* must be left to states). Applying the substantive rule of *Atkins* to hold that a *procedural Penry I* error occurs whenever the defendant introduces low IQ evidence would "impose a new obligation" on the State of Texas to treat such defendants differently and would implicitly overrule *Jurek* where the Court has repeatedly assured Texas that *Jurek* remains good law. *Penry I,* 492 U.S. at 318-19; *Lowenfield,* 484 U.S. at 245; *Franklin,* 487 U.S. at 182. Such a holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents, as well as *Graham* and *Johnson*, that the state court relied upon in adjudicating Tennard's claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [1991] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of the Eighth Amendment" with regard to Tennard's mitigating evidence. *Id.* at 472.

> The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.

Johnson, 509 U.S. at 366-67. Thus, to the extent Tennard advances a new, procedural interpretation of *Atkins,* both the AEDPA and the non-retroactivity doctrine of *Teague* bar relief.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

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In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUMMARY OF ARGUMENT

Tracking the opinion of the Texas Court of Criminal Appeals (CCA), Respondent argues that the Eighth Amendment was satisfied in this case because Mr. Tennard's jury conceivably could have given some indirect mitigating effect to his 67 IQ. This contention depends on a post hoc reconstruction of the evidence and arguments at Mr. Tennard's punishment phase – a reconstruction that differs markedly from the actual trial. In fact, no direct and unambiguous vehicle existed for Mr. Tennard's jury to give effect to this classically mitigating evidence. Indeed, Mr. Tennard's situation was arguably worse than the one Penry faced in his original trial because Mr. Tennard's sole mitigating evidence was emphatically placed outside the special issues by the arguments of the prosecution.

Perhaps recognizing that the former Texas special issue scheme cut off meaningful consideration of Mr. Tennard's evidence by the jury, Respondent urges a dramatic departure from the settled legal standard. Instead of asking whether the special issues afforded "meaningful consideration" of Mr. Tennard's mitigating evidence, Respondent asks only whether the jury was "altogether prevented" from giving it effect. In addition, Respondent, like the CCA, remarkably invokes a post-conviction judicial fact-finding concerning the extent of Mr. Tennard's impairment as a basis for concluding that, *at trial*, the jury was afforded an adequate vehicle for giving mitigating effect to his 67 IQ. Respondent's arguments represent wrongheaded and unprecedented approaches to evaluating Eighth Amendment individualization claims, and this Court should reject them as objectively unreasonable.

The evidence of Mr. Tennard's substantial cognitive disability falls within the heartland of circumstances that this Court has long recognized as central to a sentencing jury's informed assessment of the defendant's personal culpability and the appropriateness of a death sentence. Mr. Tennard's jury was unable to respond to the evidence in that manner, and post-conviction judicial assessments

of the strength and significance of his evidence in no way validate the constitutionally inadequate sentencing phase. A straightforward application of *Penry I* compels the conclusion that Mr. Tennard's death sentence cannot stand.

ARGUMENT

I. RESPONDENT'S PROPOSED STANDARD OF REVIEW SQUARELY CONFLICTS WITH *PENRY V. LYNAUGH*, 492 U.S. 302 (1989) [*PENRY I*], *JOHNSON V. TEXAS*, 509 U.S. 350 (1993), AND *PENRY V. JOHNSON*, 532 U.S. 782 (2001) [*PENRY II*], WHICH REQUIRE "MEANINGFUL CONSIDERATION" OF MITIGATING EVIDENCE TO FACILITATE A "REASONED MORAL RESPONSE" TO THE OFFENDER AND THE OFFENSE.

Respondent misdescribes the standard for reviewing a claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). According to Respondent, the *Penry* inquiry is whether the jury was "altogether prevented from considering [Mr. Tennard's] IQ score and truthfully answering the punishment phase special issues in such a way that [Mr.] Tennard would receive a sentence of life imprisonment." Brief of Respondent ("R.B.") at 1; *see also* R.B. at 12, 17, 20. This Court has never used that language in its four decisions addressing the merits of as-applied challenges to the former Texas special issue scheme. *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989) [*Penry I*]; *Johnson v. Texas*, 509 U.S. 350 (1993); *Penry v. Johnson*, 532 U.S. 782 (2001) [*Penry II*].[1] Such

[1] *Jurek v. Texas*, 428 U.S. 262 (1976), by contrast, upheld this scheme against a facial challenge, which is, "of course, the most difficult challenge to mount successfully, since the challenger must establish

(Continued on following page)

language is flatly inconsistent both with those decisions and with the Court's general Eighth Amendment framework implementing individualized sentencing.

In *Penry I*, the Court described the inquiry as whether Penry's evidence of mental retardation and childhood abuse had "relevance to his moral culpability beyond the scope of the special issues [such] that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." 492 U.S. at 322. Accordingly, even when the former issue scheme does not "altogether prevent" consideration of a defendant's mitigating evidence in a given case, the scheme is nonetheless constitutionally inadequate if the jury cannot "consider *fully* [a defendant's] mitigating evidence as it bears on his personal culpability." 492 U.S. at 323 (emphasis added). While Respondent maintains that the Constitution is satisfied so long as the State can assert any conceivable connection between a defendant's evidence and the special issues, *Penry I* itself explicitly rejected such a rule. The Court acknowledged that Penry's "mental retardation was relevant to the question whether he was capable of acting 'deliberately.'" 492 U.S. at 322. But the Court insisted that the jury be afforded a more robust vehicle for considering and giving effect to Penry's mitigating evidence because "it also 'had relevance to his moral culpability beyond the scope of [that question].'" 492 U.S. at 322 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1987) (O'Connor, J., concurring)).[2]

that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[2] Accepting Respondent's invitation to adopt a new standard under which "the issue is not whether [a defendant's mitigating evidence] had some relevance outside the special issues *but whether the evidence had some relevance within the special issues*," R.B. at 32, would be plainly inconsistent with *Penry I* because the Court acknowledged that Penry's

(Continued on following page)

Likewise, in *Johnson v. Texas*, in evaluating Johnson's claim that the special issues unconstitutionally constrained the jury's consideration of his youth, the Court understood the issue to be whether "the jury had a *meaningful* basis to consider the relevant mitigating qualities" of that evidence. 509 U.S. at 369 (emphasis added). Because "the signature qualities of youth are transient," the Court held that in Johnson's case, unlike in Penry's, there was "ample room" to take account of Johnson's youth in assessing his dangerousness in the future. 509 U.S. at 368. And, in *Penry II*, the Court emphatically reaffirmed *Penry I*'s holding that "'a sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances.'" 532 U.S. at 797 (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting)).[3]

Notably, Respondent imports the "altogether prevented" language, not from a decision resolving the merits of a challenge to the former Texas scheme, but from *Saffle v. Parks*, 494 U.S. 484, 491 (1990), in which the Court rejected on nonretroactivity grounds a habeas challenge to an antisympathy instruction in an Oklahoma capital murder trial. In *Parks*, the jury had been explicitly directed to consider mitigating evidence and was afforded an

mitigating evidence "was relevant" to the deliberateness special issue, 492 U.S. at 322, and nonetheless reversed Penry's death sentence.

[3] To the extent that any tension existed between *Penry I*'s insistence that jury instructions must unmistakably inform the jurors of their right to fully consider a defendant's mitigating evidence, on the one hand, and *Johnson*'s recognition that a State may reasonably regulate consideration of mitigating evidence on the other, *Penry II*'s explicit endorsement of *Penry I*'s holding that the jury must be allowed to give "full" consideration and "full" effect to mitigating circumstances confirms that cases like Mr. Tennard's, involving evidence of classically mitigating cognitive impairment, are squarely within the ambit of *Penry I*. *Penry II*, 532 U.S. at 797.

unconstrained vehicle for giving it effect.[4] In comparing Parks's claim to Penry's, the Court contrasted the failure of the Texas special issue scheme to permit full consideration of mitigating evidence with the purported defect of the antisympathy instruction – that it undermined solicitous consideration of mitigating evidence that was otherwise within the jury's effective reach under the Oklahoma scheme. This was the context for the Court's observation that, while Penry's jury was "altogether prevented" from giving effect to his mitigating evidence, Parks's jury was expressly instructed to consider mitigating evidence.

Thus, the context of the discussion in *Parks* makes clear that the Court was not announcing a new test for *Penry* claims, nor suggesting that it was permissible for a state scheme to "somewhat" prevent consideration of relevant mitigating evidence. Indeed, elsewhere in the *Parks* opinion itself, the Court declared that the "State must not cut off *full* and *fair* consideration of mitigating evidence." 494 U.S. at 493 (emphasis added). Moreover, the fact that *Parks*' "altogether prevented" language appears nowhere in the Court's two subsequent decisions addressing the merits of *Penry* claims – *Johnson* and *Penry II* – suggests that the Court's observation about the significant limitations of the former special issues scheme was not intended to raise the burden for those seeking relief from death sentences imposed under that defective scheme.

[4] The jury was instructed to "consider *all* of the mitigating circumstances, statutory or nonstatutory," offered by the defendant, as well as "*any* mitigating circumstances that it found from the evidence." *Parks*, 494 U.S. at 486-87 (emphasis added).

II. RESPONDENT'S COUNTER-INTUITIVE, POST HOC SPECULATION ABOUT HOW THE JURY MIGHT HAVE GIVEN EFFECT TO MR. TENNARD'S 67 IQ WITHIN THE SPECIAL ISSUE SCHEME DISTORTS THE ACTUAL EVIDENCE AND ARGUMENTS PRESENTED AT MR. TENNARD'S TRIAL.

Respondent endorses the CCA's contention that there was "ample room within [the future dangerousness inquiry] for the jury to give effect to any mitigating qualities of [Mr. Tennard's] low IQ evidence." JA 92.[5] On this account, the jury could have used the evidence of Mr. Tennard's 67 IQ to conclude, based on "the circumstances of this offense and [Mr. Tennard's] prior felony rape conviction," that Mr. Tennard was "a 'follower' instead of a 'leader' since he participated in the commission of both crimes with others." JA 91. Respondent then surmises that the jury – if it believed that Mr. Tennard's 67 IQ supported the notion that he was a follower – "could have given mitigating effect to Mr. Tennard's IQ by determining that there was a reasonable doubt whether he would be a future danger once incarcerated in the structured environment of prison and removed from his peer group." R.B. at 31.

[5] Respondent also repeats and embraces the CCA's unexplained assertion that Mr. Tennard's evidence could have supported a negative answer to the deliberateness special issue. R.B. at 30. But neither the CCA nor Respondent explains how that issue provided any better vehicle for considering Mr. Tennard's impairment than it provided for Penry's. Just as in *Penry I*, the jury might have thought that Mr. Tennard acted deliberately but did not deserve to die because of his cognitive impairment. In such a case, the special issue scheme did not meet constitutional standards, and the absence of a separate vehicle for considering Mr. Tennard's evidence of his 67 IQ requires relief under *Penry I*.

At Mr. Tennard's trial, however, no one ever suggested to the *jury* that it might give effect to the mitigating evidence of Mr. Tennard's substantial disability in this convoluted fashion. Indeed, defense counsel never argued that Mr. Tennard's cognitive impairment made him less dangerous. Counsel's evident purpose in offering testimony to establish Mr. Tennard's 67 IQ and the guilelessness Mr. Tennard showed toward his prior victim, Valerie Soto, was to demonstrate his impaired judgment. The commonsense appeal of this evidence went not to Mr. Tennard's future dangerousness (it was aggravating in this regard) but to his limited capacity to resist, and understand the consequences of, criminal conduct. Counsel did challenge, on the basis of her own prior statement, Ms. Soto's characterization of Mr. Tennard as the "leader" of the group that assaulted her. SF 29:43-44; JA 22-23. However, counsel never asserted that Mr. Tennard acted as a "follower" or under the duress or domination of his codefendants in committing that assault. Perhaps more importantly, Mr. Tennard did not and could not claim that "peer pressure" caused him to take part in the offense for which he was sentenced to death. Indeed, Respondent recounts, as support for the conclusion that Mr. Tennard does not have mental retardation, the fact that "Tennard gave directions to Bogany and Groom during the murder." R.B. at 33 (quoting JA 129).

Respondent invokes *Johnson* to justify the CCA's tortured chain of inferences by which the jury might conceivably have given some indirect mitigating effect to Mr. Tennard's 67 IQ. But the "relevant mitigating qualities" of the evidence at issue in *Johnson* – the transient characteristics of immaturity – were directly and unambiguously relevant in a mitigating way to whether Johnson posed a continuing threat to society. *Johnson*, 509 U.S. at 368-69. The relevant mitigating qualities of Mr. Tennard's cognitive impairment, by contrast, are indistinguishable in kind from those of Penry's mental retardation and experience of abuse as a child. As a consequence, they bore no such straightforward and sensible mitigating relevance to

the "continuing threat" issue, and, in the absence of additional instructions, this Court can have no confidence that they lay within the jury's "effective reach" in imposing sentence.

The specific inference Respondent now says the jury could have drawn – that a person whose 67 IQ makes him "a follower" would pose no risk of future criminal behavior once he is "removed from his peer group" and placed in the "structured environment of a prison" – is objectively unreasonable for two additional reasons. First, no reasonable juror would share that speculation. Jurors know that one's "peer group" in prison will include convicts likely to take advantage of a cognitively disabled "follower" to promote their own criminal misbehavior.[6] More importantly, this argument powerfully reveals how far Respondent is willing to depart, in trying to salvage Mr. Tennard's death sentence, from the straightforward "moral culpability" inquiry at the heart of capital sentencing. A capital defendant might be a "follower" for any number of reasons unrelated to cognitive impairment (emotional dependency, blood kinship, gang loyalty, drug addiction, etc.) – but those reasons might have very different implications for his personal culpability. It is utterly inconsistent with this Court's individualized sentencing decisions to permit a State to so limit the mitigating relevance of a capital defendant's 67 IQ that it can bear no more mitigating significance in the jury's ultimate calculus of moral desert than, *e.g.*, another capital defendant's gang membership. *Cf. Lockett v. Ohio*, 438 U.S. 586, 593, 608 (1978) (Ohio scheme unconstitutional because facts universally understood to have mitigating relevance were not permitted *as*

[6] The prosecution's closing argument sought to foreclose any reliance on Mr. Tennard's capacity to adapt to prison life by insisting that the dangerousness special issue concerned only his likely behavior *outside* prison. JA 59-60. Thus, even if defense counsel had made the tortured argument suggested by the CCA, the jury would have been deterred from acting upon it.

such to affect the sentencing decision, but could be considered only for their relevance to other inquiries, including whether defendant acted "under duress, coercion, or strong provocation").

Finally, both sides' closing arguments demonstrate the logical constraints imposed by the unadorned special issues. Rather than try to convince the jurors that they could sensibly answer the "future dangerousness" issue "no" by following some lengthy chain of speculative inferences, defense counsel simply argued that "under Texas law" they had "a right" to "take all the things into consideration that [he had] talked to [them] about," including Mr. Tennard's "67 IQ" and their own "attitude[s] toward the death penalty."[7] SF 29:94; JA 57-58. At the same time, the prosecution maintained that Mr. Tennard's evidence of his 67 IQ was irrelevant to the special issues. Regarding the deliberateness special issue, the prosecution suggested that considering Mr. Tennard's impairment was tantamount to nullification and that his 67 IQ was not a "fact" relevant to that question:

> I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts. (SF 29:72; JA 41.)

The prosecution likewise insisted that Mr. Tennard's low intelligence should not be considered via the dangerousness special issue:

> But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, [sic] the reasons why he

[7] In this respect, defense counsel's argument functioned much like the nullification instruction that this Court invalidated in *Penry II*.

> became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question. (SF 29:98; JA 60.)

Respondent quotes the CCA's assertion that "both sides argued [the low IQ's] significance for punishment." R.B. at 34. It is much fairer to say that after defense counsel put evidence of Mr. Tennard's low IQ before the jury and essentially begged the jury to think about that evidence notwithstanding the narrow compass of the special issues, the prosecution insisted that it not be considered at all.[8] The CCA's defense of Mr. Tennard's death sentence thus rests on a strained interpretation of the evidence and instructions that no party to the trial proceedings articulated, giving this Court no confidence that the jury would have arrived at that understanding on its own. On this record, there is certainly a "reasonable likelihood" that the jury felt compelled to ignore Mr. Tennard's evidence. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (proper test is "whether there is a reasonable likelihood" that the jury was constrained in considering constitutionally relevant evidence).

III. THE POST-TRIAL JUDICIAL FACT-FINDING THAT MR. TENNARD DOES NOT MEET THE AAMR DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION IS IRRELEVANT TO AN ASSESSMENT OF THE CONSTITUTIONAL ADEQUACY OF THE PUNISHMENT PHASE JURY INSTRUCTIONS.

Much of Respondent's brief – like much of the CCA's opinion denying relief – disputes whether Mr. Tennard has mental retardation. *See, e.g.*, R.B. 27 (contrasting cases

[8] Despite asserting that "both sides argued its significance for punishment," Respondent's entire brief omits any quotation of or citation to the prosecution's actual argument concerning how Mr. Tennard's 67 IQ might connect to the special issues.

involving "legitimate evidence of mental retardation"). Indeed, Respondent insists that a state postconviction judicial "fact-finding" that Mr. Tennard does not have mental retardation is entitled to deference and is fatal to Mr. Tennard's *Penry* claim. R.B. 32. This argument succeeds only if this Court agrees that a permanent, substantial mental impairment short of mental retardation can somehow be given meaningful effect via the deliberateness and dangerousness special issues. Moreover, relying on postconviction judicial fact-findings to assess the adequacy of a jury instruction at trial represents a bizarre and unprecedented departure from this Court's cases elaborating and enforcing the individualization requirement.

Mr. Tennard did not raise in the proceedings below an *Atkins* claim alleging that he is ineligible for the death penalty based on mental retardation. Throughout this litigation, the central question before the courts has been whether the former Texas special issue scheme, in the context of Mr. Tennard's trial, provided a constitutionally adequate vehicle for the jury to consider the evidence of his very low IQ. But instead of focusing on whether that evidence (like Penry's evidence of mental retardation and abuse) had mitigating significance beyond the special issues, the CCA and Respondent have asked only whether Mr. Tennard's evidence was identical to Penry's. This approach mistakes the facts of *Penry* for its underlying principle and cannot excuse the CCA's failure to determine whether the jury's verdict represented a reasoned moral response in light of Mr. Tennard's evidence.

As demonstrated above, Mr. Tennard's evidence of mental impairment could be given no more meaningful consideration via the special issues than Penry's evidence that he met the clinical definition of "mental retardation." The deliberateness question as submitted to Mr. Tennard's jury did not appear to ask anything other than whether

he contemplated that death would occur.[9] Indeed, the prosecution encouraged the jury to understand the issue as precluding a broader assessment of Mr. Tennard's moral culpability.[10] Nor could Mr. Tennard's counsel have plausibly claimed that Mr. Tennard's very low IQ was a "transient" condition supporting a negative answer to the dangerousness special issue. Just as in *Penry I*, Mr. Tennard's evidence of mental impairment was *aggravating* rather than *mitigating* under the second special issue of the former Texas scheme, and the prosecution repeatedly warned the jury not to venture beyond the scheme's narrow inquiry. In short, Mr. Tennard's evidence faced the exact same obstacles as Penry's, and the fact that Penry's impairment was labeled as mental retardation has no bearing on the resolution of Mr. Tennard's claim.

More broadly, the CCA's reliance on a postconviction fact-finding regarding the extent of Mr. Tennard's impairment represents a striking departure from this Court's cases.[11] The Court has long regarded the weight of

[9] As indicated in Petitioner's initial brief, the deliberateness issue was in fact intended to perform this modest function in accomplice liability cases. *See* Brief of Petitioner ("P.B.") at 15 n.7.

[10] As described above, the prosecution recognized that the deliberateness special issue was not an appropriate vehicle for considering Mr. Tennard's 67 IQ and implied that such consideration would be tantamount to nullification. *See supra* 9-10. Far from suggesting that the deliberateness question involved a comprehensive assessment of Mr. Tennard's personal moral culpability, the prosecution asserted that the testimony of the coroner and the facts contained in the autopsy report conclusively established deliberateness: "[T]he testimony of Dr. Espinola and the autopsy that he performed [ ] proves beyond any doubt that this was a deliberate act." SF 29:74; JA 43.

[11] Indeed, the jury at Penry's recent retrial found him not to have mental retardation for *Atkins* purposes. *See* Associated Press, "Jury Gives Penry Death" (July 3, 2002). By Respondent's logic, the sentencing instructions in *Penry I* and *Penry II* should now be regarded as

(Continued on following page)

evidence offered in mitigation as exclusively a matter for the sentencer and has invalidated state-created obstacles to the consideration of such evidence. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 441 (1990) ("the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death"). Given this Court's strong protection of a sentencer's right to assess the moral significance of such evidence, it was objectively unreasonable for the CCA to discount the constitutional significance of Mr. Tennard's evidence of mental impairment based on post-conviction judicial fact-findings that Mr. Tennard does not have mental retardation.[12]

In resolving dozens of cases resolving individualization claims, this Court has never looked to post-trial fact-findings to determine whether the sentencer was afforded an adequate opportunity to consider and give effect to mitigating evidence.[13] This Court has always focused on

constitutionally sufficient in light of this "new evidence" regarding the severity of Penry's impairment. On this view, *Penry* is not simply limited to its facts, but unavailable to Penry himself.

[12] Notably, the CCA also suggested that Mr. Tennard should not prevail under *Penry I* even if his impairment constituted mental retardation. JA 88 ("Assuming the evidence of applicant's low IQ somehow falls with *Penry I*'s definition of mental retardation, we still hold applicant is not entitled to relief under *Penry*.")

[13] Ironically, Respondent insists on consulting post-conviction findings in adjudicating Mr. Tennard's claim while at the same time refusing to analyze Mr. Smith's claim (in the companion case) in light of the recent acknowledgment by the State that Mr. Smith has mental retardation. Although Respondent informs this Court that the State's psychologist has found Mr. Smith to have mental retardation, R.B. at 13 n.8, Respondent repeatedly describes Mr. Smith's impairment as something other than mental retardation. *See, e.g.*, R.B. at 14 ("low intelligence"); *id.* at 37 ("low IQ"); *id.* at 38 ("low IQ"). We believe that

(Continued on following page)

the nature of the evidence offered by the defendant, the language of the instructions provided to the jury, and the arguments advanced by counsel respecting the appropriate application of those instructions. Here, these traditional considerations all point to the inadequacy of the former Texas scheme in the context of Mr. Tennard's trial. The CCA's and Respondent's attempt to salvage this death sentence based on post-trial judicial assessments of his mitigating evidence finds no support in this Court's decisions. And, as argued above, even if this Court credited "the state court's presumptively correct fact findings," R.B. at 32, the result would remain the same because Mr. Tennard's permanent mental impairment was no different from Penry's with respect to the jury's ability to give it full effect within the special issues.

IV. THE SEVERITY AND NEXUS TESTS DEFENDED BY RESPONDENT UNDERMINE RATHER THAN ADVANCE THE RELIABILITY OF CAPITAL SENTENCING AND ARE OBJECTIVELY UNREASONABLE IN LIGHT OF THIS COURT'S DECISIONS.

The decision of the Court of Appeals below rested on two core premises: (1) that Mr. Tennard's cognitive disability, as reflected by his IQ of 67, was constitutionally irrelevant to his appropriate punishment because it was insufficiently severe; and (2) that counsel failed to offer specific testimony causally linking Mr. Tennard's disability to his crime. 284 F.3d 591, 596 (5th Cir. 2002) (IQ of 67 "does not constitute a uniquely severe condition"); *id.*

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the appropriate, consistent position in both cases, under this Court's uniform practice, is to evaluate the petitioners' respective *Penry* claims based solely on the evidence presented at trial.

(defense "made no showing at trial that the criminal act was attributable to [this] condition"). Respondent defends these propositions only indirectly, arguing that decisions of the CCA resting on the same assumptions represent a "reasonable" interpretation of *Penry*.[14] For the reasons set out in detail in our opening brief, such a reading is so divorced from the principles underlying *Lockett*, *Eddings*, and both *Penry* decisions as to be objectively unreasonable. *See* P.B. 27-47. We will confine our reply to the most serious of Respondent's misstatements of the governing law.

Respondent defends the "nexus" requirement on the basis of a purported national consensus. According to Respondent, it is "the viewpoint of society as a whole" that proffered mitigating conditions do not "tend to excuse" criminal offenses unless the defendant demonstrates that they "caused" him to commit the crime. R.B. at 26-27 (citing and quoting *Richardson v. State*, 879 S.W.2d 874, 884-885 (Tex. Crim. App. 1993)). Moreover, in the CCA's view, "without such a requirement [of causation], 'a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which

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[14] As Respondent describes it, under the CCA's test a defendant's mitigating evidence does not entitle him to additional instructions beyond the former special issues unless it reflects a condition that is "involuntary" (R.B. at 22-23), "long-term [or] permanent in nature" (R.B. at 23-24), at least as severely disabling as the evidence at issue in *Penry I* (*i.e.*, a combination of clinically diagnosed mental retardation and long-term severe child abuse) (R.B. at 24-25), and the cause of the crime (R.B. at 25-26). These same elaborate features are central to the Fifth Circuit's interpretation of *Penry I* – and absent from this Court's own cases. P.B. at 11, 24-48.

death is imposed from [those] in which it is not.'" R.B. at 27 (quoting *id.* at 884 n.11).

This argument errs, first, because it is impossible to square with *Penry I*. Justice O'Connor did observe for the *Penry I* Court that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I*, 492 U.S. at 319 (citation omitted). We have explained, however, why this passage cannot be read to impose a requirement that a defendant establish a definitive causal link between his mitigating evidence and his crime. *See* P.B. at 37-41. Moreover, real-world mental health experts take it as a given that no disability – *even mental retardation* – can be shown to have the sort of one-to-one correspondence with individual acts of human behavior necessary to satisfy the "nexus" requirement as articulated in the opinions Respondent defends. *See, e.g.*, Brief of the American Association on Mental Retardation, et al., in Support of Petitioners, at 11-15.

Second, the assertion that "society as a whole" shares such a mechanistic conception of mitigation is belied by the legislative judgment reflected in statutes providing for plenary consideration of circumstances urged in mitigation of sentence, without any reference to whether those conditions are shown to have been causally linked with the crime. *See, e.g.*, P.B. at 45 n.26 (citing statutory provisions). Such enactments – like the post-*Penry I* Texas capital sentencing scheme which places no "nexus" limitation on the jury's consideration of mitigating evidence – surely reflect more accurately what "society as a whole" regards as mitigating than does Respondent's unsupported assertion. Indeed, Respondent can point to no statutory scheme embodying the purportedly "national" view that

evidence lacking a deterministic causal link to the crime may be dismissed as irrelevant.

In addition, in enforcing their "nexus" requirement, the Fifth Circuit and the CCA have focused exclusively on what the defendant has "shown" as opposed to what the jury reasonably could have *inferred* from the evidence. *See, e.g., Richardson*, 879 S.W.2d at 884-885 (blaming the defendant for having "made no showing" that a nexus existed; stating that its conclusion might be different if he had "presented evidence" establishing "that his capital crime was caused in part by [his] damaged personality"); *see also Robertson v. Cockrell*, 325 F.3d 243, 272 (5th Cir. 2003) (en banc) (Stewart, J., dissenting) ("nexus" and "severity" requirements "prevent[] the jury from determining whether [the defendant's] childhood abuse is mitigating and whether to give it any weight").[15] Imposing such a condition on the consideration of mitigating evidence is impossible to reconcile with this Court's cases which rightly assume that properly instructed jurors can draw such inferences where they are consistent with common sense and shared human experience.

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[15] Respondent argues that an "inference of causation" will show a sufficient "nexus," but the sheer number and variety of circumstances which the Fifth Circuit has dismissed as having no arguable nexus with a defendant's criminal behavior belie that contention. *See, e.g., Nelson v. Cockrell*, 77 Fed. Appx. 209, 213 (5th Cir. 2003) (brain damage); *Robertson v. Cockrell*, 325 F.3d 243, 253 (5th Cir. 2003) (en banc) (child abuse); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) (very low I.Q.); *Davis v. Scott*, 51 F.3d 457, 461-462 (5th Cir. 1995) (paranoid schizophrenia, violent paraphilia, and child abuse); *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994) (mental illness); *Lackey v. Scott*, 28 F.3d 486, 489-490 (5th Cir. 1994) (child abuse and very low I.Q.); *Madden v. Collins*, 18 F.3d 304, 307-308 (5th Cir. 1994) (avoidant personality disorder, organic brain impairment, and child abuse); *Barnard v. Collins*, 958 F.2d 634, 638 (5th Cir. 1992) (head trauma and troubled childhood).

Ultimately, Respondent claims that this Court must confine the reach of *Penry I* by adopting the restrictions imposed by the Fifth Circuit and the CCA – including both the "unique severity" and "nexus" requirements – because "without [such] requirement[s], 'a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which death is imposed from the cases in which it is not.'" R.B. at 27 (quoting *Richardson*, 879 S.W.2d at 884 n.11). According to Respondent, affording Mr. Tennard's jury a direct and unambiguous vehicle for expressing the view that he should be spared the death penalty because he has an IQ of 67 would "allow[] the fate of [defendants] to turn on the vagaries of particular jurors' emotional sensitivities," in violation of the Eighth Amendment requirement that capital sentencing be "reliable, accurate, and nonarbitrary." R.B. at 27 (quoting *Parks*, 494 U.S. at 493-94). But post hoc judicial evaluations of mitigating evidence on a cold record are unlikely to result in more "reliable" or "accurate" sentences. Moreover, adopting Respondent's view that the "severity" and "nexus" constraints are indispensable to nonarbitrary sentencing would render unconstitutional all existing schemes, because they impose no such limitations.[16]

[16] *Penry II*'s endorsement of the current, post-*Penry I* Texas sentencing scheme forecloses this conclusion. 532 U.S. at 803 (describing Tex. Code Crim. Proc. Ann. art. 37.071(2)(e)(1) (Vernon Supp. 2001), which directs the jury to consider, without any nexus or severity limitation, whether "there is a sufficient mitigating circumstance . . . to warrant [a] sentence of life imprisonment" as a "clearly drafted catchall instruction on mitigating evidence [that would have] complied with *Penry I*").

V. *TEAGUE* DOES NOT PRECLUDE RELIEF.

Contrary to Respondent's assertions, *Teague v. Lane*, 489 U.S. 288 (1989), is no bar to relief. Mr. Tennard seeks only the application of a fair reading of *Penry I*, decided before his conviction became final. He is not asking this Court to announce any "new rule." *See Penry I*, 492 U.S. at 319 (result Penry sought was "dictated by *Eddings* and *Lockett*"). Respondent's mistaken reliance on *Teague* arises from his failure to appreciate how *Atkins v. Virginia*, 536 U.S. 304 (2002), confirms the correct resolution of Mr. Tennard's *Penry I* claim.

Atkins recognizes a firm national consensus that capital defendants with mental retardation are "categorically less culpable" than other offenders, 536 U.S. at 315-16, and so may not be sentenced to death, no matter how terrible their crimes. If a capital defendant suffers from a severe cognitive impairment that falls just short of satisfying the clinical criteria for mental retardation, he is still eligible for the death penalty. But it flies in the face of reason to conclude, as have the Fifth Circuit and the CCA, that his impairment is therefore constitutionally irrelevant to whether a death sentence ought to be imposed because it is insufficiently severe. Falling just outside the scope of *Atkins* necessarily entails the presence of constitutionally relevant mitigating evidence.

Thus understood, *Atkins* does not govern this case directly but simply illuminates why the CCA's rejection of Mr. Tennard's *Penry I* claim was objectively unreasonable. A cognitive impairment so severe that it nearly exempts a defendant from capital punishment altogether (like Mr. Tennard's 67 IQ) cannot reasonably be treated as constitutionally irrelevant to the jury's assessment of his culpability. This was the evident implication when this Court directed the Fifth Circuit to reconsider its rejection of Mr. Tennard's *Penry* claim after *Atkins*. *See Tennard v.*

Cockrell, 537 U.S. 802 (2002) (mem.). *Teague* cannot excuse the Fifth Circuit's failure to recognize the significance of *Atkins* in this context, nor save the CCA's misapplication of *Penry I* in Mr. Tennard's case.

CONCLUSION

This Court should grant a new sentencing hearing.[17]

Respectfully submitted,

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[17] The interests of judicial economy support resolving the merits of Mr. Tennard's *Penry* claim rather than simply reversing the Court of Appeals' denial of a certificate of appealability (COA). *See Penry II*, 532 U.S. at 796-804 (addressing merits of Eighth Amendment claim after Court of Appeals denied COA).

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In the Supreme Court of the United States

ROBERT JAMES TENNARD,
ROBERT SMITH,

Petitioners,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL MENTAL HEALTH ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL MENTAL HEALTH ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The National Mental Health Association ("NMHA") is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. With 340 affiliates in 43 states and the District of Columbia, NMHA has worked toward eliminating discrimination against and public misconceptions about people with mental disabilities since 1909. NMHA believes that mental disabilities can influence an individual's mental state at the time he or she commits a crime. NMHA also believes mental disabilities should be taken into account as a mitigating factor during all phases of a potential death penalty case.

SUMMARY OF ARGUMENT

Petitioners Robert Smith and Robert Tennard are part of a small but important group of capital defendants that has been "left in an eddy, missing the tide in both directions." *Robertson v. Cockrell*, 325 F.3d 243, 259 (5th Cir.) (*en banc*) (Higginbotham, J., concurring), *cert. denied*, 124 S. Ct. 28 (2003). These defendants have mitigating evidence of mental disabilities that must be considered, but their evidence does not rise to the level of mental retardation or insanity that would bar their executions entirely under *Atkins v. Virginia*,

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[1] The parties' written consent to the filing of this brief is being filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

536 U.S. 304 (2002), or *Ford v. Wainwright*, 477 U.S. 399 (1986). In addition, because these defendants were sentenced prior to Texas' 1991 statutory change, their juries were not given a separate question as a vehicle for considering this mitigating evidence, though some were given the "nullification" instruction this Court later struck down in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). As to this group, Fifth Circuit precedent confines *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), to its facts, refusing to require a separate mitigation question unless the evidence meets a strict threshold test of "constitutional relevance."

This Court should reject the Fifth Circuit's restrictive approach for two reasons. First, the Fifth Circuit's threshold test dismisses a sizeable category of mental disability evidence even though that evidence cannot be given full effect under the pre-1991 Texas capital sentencing instructions. Second, the Fifth Circuit test suffers from several constitutional flaws. It prevents the jury from giving effect to all the mitigating evidence, injects an impermissible harmless error inquiry, usurps the jury's individualized sentencing determination, and deviates from the modern trend among the States (including Texas) of asking a separate mitigating evidence question in all capital cases. Rather than adopting this flawed test, this Court should adhere to its analysis in *Penry I*, hold that Petitioners' juries could not give effect to their mental disability evidence, and reverse and remand these cases for new sentencing hearings.

ARGUMENT

To determine whether a capital murder defendant is entitled to a separate mitigating evidence question at sentencing, the Fifth Circuit first considers whether the defendant presented "*constitutionally relevant* mitigating evidence." *Smith v. Cockrell*, 311 F.3d 661, 679-680 (5th Cir. 2002) (emphasis added), *cert. granted in part sub nom.*

Smith v. Dretke, 124 S. Ct. 46 (2003). This test has two parts, and Petitioners challenge both in this Court.

First, the defendant's evidence must show a "uniquely severe permanent handicap[] with which [he] was burdened through no fault of his own." *Id.* at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995)). Second, the evidence must show a causal "nexus" between this handicap and the defendant's crime. *Id.* at 680-81; *see also Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *cert. granted sub nom. Tennard v. Dretke*, 124 S. Ct. 383 (2003) (must show criminal act "was attributable" to handicap). Only if both prongs of this threshold test are met will the Fifth Circuit conduct the inquiry mandated by this Court in *Penry I*: whether the jury could fully consider and give effect to the defendant's mitigating evidence under the existing Texas instructions. 492 U.S. at 320-22; *see Smith*, 311 F.3d at 680 (whether evidence is "beyond the 'effective reach' of the jurors" (citation omitted)).

The restrictions imposed by the Fifth Circuit's threshold test are in conflict with a long history of this Court's jurisprudence aimed at ensuring that jurors have an opportunity to consider and give effect to *all* mitigating evidence. Under this Court's cases, a jury generally will need a separate mitigating evidence question to enable it to give effect to mental disability evidence.

I. EVIDENCE OF MENTAL DISABILITIES AND THEIR CAUSES GENERALLY REQUIRES A SEPARATE MITIGATING EVIDENCE QUESTION.

A. Mental Disability Evidence, Like All Mitigating Evidence, is Constitutionally Relevant.

The pillar of this Court's approach to the role of mitigating evidence in the punishment phase of a capital murder trial is that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant

mitigating evidence." *Penry I*, 492 U.S. at 318. When this Court upheld the constitutionality of the pre-1991 Texas capital sentencing scheme in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the plurality held that a sentencing jury "must be allowed to consider on the basis of all relevant evidence not only why a death penalty should be imposed, but also why it should not be imposed." *Id.* at 271. Among that "relevant evidence" is "*whatever* evidence of mitigating circumstances the defense can bring before it." *Id.* at 273 (emphasis added).

Two years later in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court explained that relevant mitigating evidence includes "*any aspect* of the defendant's character or record *and* any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (plurality opinion) (emphasis added). Beginning with *Lockett*, this Court has reversed death sentences repeatedly when the sentencer was either unable or unwilling to consider any mitigating evidence that fell within this broad definition. *E.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 439-443 (1990); *Penry I*, 492 U.S. at 318; *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett*, 438 U.S. at 608-09.

None of these decisions has required a defendant to make a heightened threshold showing that his mitigating evidence is "constitutionally relevant." Rather, *McKoy* confirms that "[t]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other evidentiary context. 494 U.S. at 440. Thus, "to be relevant to an inquiry, [mitigating evidence] need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* (citations omitted).

The theory underlying this broad definition of mitigating evidence is "that punishment should be directly related to the personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. Applying these principles, this Court already has determined that mental disability evidence – including evidence of low intelligence or mental illness, as well as a history of childhood abuse contributing to these conditions – is relevant to the defendant's personal moral culpability and must be considered by the jury. *McKoy*, 494 U.S. at 436-37 (low I.Q.); *Penry I*, 492 U.S. at 322-23 (retardation and abuse); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emotional and mental problems or disadvantaged background); *Eddings*, 455 U.S. at 113 (personality disorder and abuse); *Bell v. Ohio*, 438 U.S. 637, 641 (1978) (mental deficiency); *see also Wiggins v. Smith*, 123 S. Ct. 2527, 2536, 2542 (2003) (relevance of low I.Q. and abuse). Furthermore, studies show that in practice, jurors intuitively grasp the moral relevance of mental disability evidence to a defendant's personal culpability.[2]

One reason mental disabilities are relevant to culpability is that they can affect a defendant's ability to understand and process information, engage in logical reasoning, abstract from mistakes and learn from experience, control impulses, or evaluate the consequences of conduct. *Atkins*, 536 U.S. at 318; *Penry I*, 492 U.S. at 322. This reason holds true not

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[2] *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539, 1564-65 (1998) (jurors "attach significant mitigating potential to facts and circumstances that show diminished mental capacity," such as mental retardation, extreme emotional or mental disturbance at the time of the offense, or a history of mental illness, and express concern for "defendants who have been seriously abused as children"); Kevin Howells et al., *Social Evaluations of Mental Illness (Schizophrenia) in Relation to Criminal Behaviour*, 22 BRITISH J. SOC. PSYCHOL. 165 (1983) (finding that survey subjects perceive mentally ill offender as less responsible, blameworthy, and deserving of punishment).

only for mental retardation, but also for many other mental disabilities and for childhood abuse.[3] In addition, the crime-deterring objective of the death penalty is less served by executing the mentally disabled, who often cannot fully assess potential outcomes from different courses of action, and who may not even comprehend the nature of the punishment they face.[4] Nothing more is required to demonstrate the "constitutional relevance" of mental disability evidence.

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[3] *E.g.*, Donald Lynam et al., *Explaining the Relation Between IQ and Delinqvency*, 102 J. ABNORMAL PSYCHOL. 187 (1993) (low I.Q. points to deficits in ability to monitor and control behavior, including sustaining attention, reasoning abstractly, forming goals, anticipating and planning, and considering future implications of acts); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. Rev. 1143, 1165 (1999) (childhood abuse can cause developmental, psychological, or neurological damage in ways that affect perception and behavior, including impaired ability to make appropriate judgments, understand consequences of actions, and make logical choices); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 299-300 (4th ed. text rev. 2000) (symptoms of schizophrenia and other psychotic disorders can include misinterpretation of experiences, disorganized thinking, and difficulty with socially appropriate and goal-directed behavior); *id.* at 464-65 (symptoms of posttraumatic stress disorder can include diminished responsiveness to external world, impaired affect modulation, self-destructive and impulsive behavior, and dissociative symptoms); *id.* at 689 (symptoms of personality disorders can include markedly abnormal perception and interpretation of other people and events, inappropriate emotional responses, and difficulty with impulse control).

[4] *Death Penalty and People with Mental Illness*, NMHA ISSUE BRIEF, *available at* http://www.nmha.org/position/deathpenalty/adultsissuebrief.cfm; *see Atkins*, 536 U.S. at 319-20.

B. The Proper Inquiry is Whether the Mitigating Evidence Can Be Given Effect Under the Texas Special Issues.

These principles do not compel resentencing in every case that lacks a separate question explaining how the jury can consider and give effect to all relevant mitigating evidence. Instead, the proper test is whether the jury can consider the defendant's particular mitigating evidence fully in answering the pre-1991 Texas special issues: whether the defendant committed the crime deliberately and with the reasonable expectation that death would result (the "deliberateness" question); and whether it is probable that the defendant would commit violent criminal acts posing a continuing threat to society (the "future dangerousness" question).[5]

This Court has addressed the constitutionality of the pre-1991 Texas death penalty statute on several occasions. In *Jurek*, the Court concluded that the future dangerousness question gave the jury an adequate vehicle for considering good reputation evidence of the defendant's steady employment and contribution to the support of his family. *Jurek*, 428 U.S. at 267, 272. In *Franklin v. Lynaugh*, 487 U.S. 164, 177-78 (1988), the Court held that the jury could give effect to the defendant's mitigating evidence of good behavior in prison by answering "no" to the future dangerousness question. And in *Johnson v. Texas*, 509 U.S.

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[5] *See Penry I*, 492 U.S. at 318-20; TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b)(1)-(2) (Vernon 1981 and Supp. 1989). When raised by the evidence, a third special issue on provocation was submitted in some cases. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b)(3) (Vernon 1981 & Supp. 1989). This third special issue is no longer given in cases in which the offense was committed after September 1, 1991, but is still given, when applicable, in cases where the offense was committed before that date. *Compare id.* art. 37.071 § 2(b)(1)-(2) (Vernon Supp. 2002) *with id.* art. 37.0711 § 3(b)(1)-(3) (Vernon Supp. 2002).

350, 368 (1993), the Court held that the future dangerousness question allowed the jury to give effect to the defendant's youth as a mitigating factor.

On the other hand, *Penry I* holds that in cases where "the jury [is] unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues," it must be separately instructed that it can give mitigating effect to that evidence in imposing sentence. 492 U.S. at 320-21. To establish the need for a separate instruction, the jury need not have been completely precluded from considering the defendant's mitigating evidence. *See Johnson*, 509 U.S. at 386 (O'Connor, J., dissenting). In fact, in *Penry I* the Court specifically noted that the defendant's evidence of mental retardation and childhood abuse did have some relevance to the deliberateness question. *Penry I*, 492 U.S. at 322. Yet because his mitigating evidence also was relevant beyond the scope of the special issues, this Court held that the Eighth and Fourteenth Amendments compelled a remand for resentencing. *Id.* at 322, 328.

In sum, if the two Texas special issues do not allow a jury to give meaningful consideration and full effect to a particular piece of mitigating evidence, a separate mitigating instruction is required. The cases just discussed, which the Court has noted are not in conflict, *Johnson*, 509 U.S. at 365, provide some guidance regarding the application of this test. The Court has not yet defined particular classes of mitigating evidence that do require a separate instruction, however.

C. Mental Disability Evidence Generally Cannot Be Given Effect Under the Pre-1991 Special Issues.

The Fifth Circuit test is not crafted to capture all relevant classes of mitigating evidence. Instead, the Fifth Circuit simply has limited *Penry I* to its facts. *See Robertson v. Cockrell*, 325 F.3d at 244 ("Because Robertson's evidence – in quality and quantity – does not match Penry's, this court concludes that the statutorily prescribed Texas special issues

allowed Robertson's jury to give mitigating effect to his proffered evidence * * *"); *Smith*, 311 F.3d at 680 ("On the issue of whether the defendant has a 'uniquely severe permanent handicap', this court has limited *Penry I* to the facts of that case * * *"). Only if the defendant offers evidence of severe mental retardation combined with extreme childhood abuse will the Fifth Circuit require a separate mitigating evidence instruction. *Robertson*, 325 F.3d at 251; *Smith*, 311 F.3d at 680. As a result, one recent case calculated that out of 47 defendants seeking relief for failure to give adequate mitigating instructions in the 14 years following *Penry I*, the Fifth Circuit granted only one resentencing hearing – to a defendant whose evidence was indistinguishable from Penry's. *Robertson*, 325 F.3d at 256; *see Blue v. Cockrell*, 298 F.3d 318, 321 (5th Cir. 2002).

The Fifth Circuit's stringent approach is too narrow. It excludes groups of defendants whose mitigating evidence cannot be fully considered and given effect by the jury under the two special issues, but who are unable to satisfy the Circuit's two-prong threshold test. The defendants who fall in this hole created by the Fifth Circuit's interpretation of *Penry I* are primarily those with mental disabilities, including those with limited mental development (*e.g.*, low I.Q.), as well as those with mental illnesses and other psychological disorders that impair their thought processes.[6] Evidence of

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[6] *See, e.g., Hernandez v. Johnson*, 248 F.3d 344 (5th Cir. 2001) (schizophrenia and childhood abuse); *Robison v. Johnson*, 151 F.3d 256 (5th Cir. 1998) (schizophrenia); *Lucas v. Johnson*, 132 F.3d 1069 (5th Cir. 1998) (schizophrenia, psychosis, and abuse); *Harris v. Johnson*, 81 F.3d 535 (5th Cir. 1996) (low intelligence); *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994) (low intelligence and abuse); *Davis v. Scott*, 51 F.3d 457 (5th Cir. 1995) (personality disorder and abuse); *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994) (personality disorder); *Demouchette v. Collins*, 972 F.2d 651 (5th Cir. 1992) (personality disorder); *but see Bigby v. Cockrell*, 340 F.3d 259 (5th Cir. 2003) (schizophrenia evidence meeting two-prong test). For a comparison of limited mental development with

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such mental disabilities, particularly in conjunction with the conditions that contribute to them, such as childhood abuse, generally has a mitigating impact that is not captured by the two special issues. There are a number of factors that contribute to this gap in the statutory sentencing scheme.

1. Mental Disability Evidence Has an Aggravating Effect on the Future Dangerousness Question.

The future dangerousness special issue does not give the jury a vehicle for concluding that mental disability evidence mitigates a defendant's personal culpability. In fact, the future dangerousness issue has little to do with the question of culpability at all. Rather, it asks the jury to make a utilitarian calculation about whether the defendant presents a continuing threat of sufficient magnitude that society as a whole will be better off if it ends his life. This calculation requires the jury to consider whether or not the defendant's crime was the product of a temporary lapse in judgment representing a departure from his normal or expected future behavior, considering facts such as: prior criminal conduct; age; temporarily extreme mental or emotional pressure (including duress or domination); and subsequent good behavior. *See, e.g., Johnson*, 509 U.S. at 363; *Franklin*, 487 U.S. at 177-78. Evidence that a mental disability makes the defendant *less* able than a normal adult to control his impulses or to evaluate the consequences of his conduct cannot be given any mitigating effect, much less full mitigating effect, in the context of this inquiry.

Furthermore, evidence of difficulty controlling impulses or evaluating consequences acts at least in part as an

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mental illness, see James W. Ellis and Ruth W. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 423-25 (1985).

aggravating factor by suggesting a "yes" answer to the future dangerousness special issue. *Penry I*, 492 U.S. at 322-24. This effect is only enhanced by the considerable public misunderstanding concerning the relationship between violent crime and mental disabilities. In general, mental disabilities make an individual no more likely or only slightly more likely to commit a crime of violence, and even this risk can drop with appropriate medication.[7] Nevertheless, the public continues to perceive the mentally disabled as violent and dangerous.[8]

The narrow focus of the Texas special issues on future dangerousness tends to play into this prejudice by straight-jacketing the defendant's presentation of his mitigating evidence within the jury's preconceived notion of mental disability. Moreover, the reality of the punishment phase of a capital murder trial, in which the jury has already concluded that the defendant has committed a heinous murder, tends to confirm jurors' views of a link between violence and mental disability even before the punishment phase begins. In the absence of a mitigating evidence special issue, there is a grave risk that the jury will view the defendant's evidence of a mental disability primarily as an aggravator and not as a

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[7] David Pilgrim & Anne Rogers, *Mental Disorder and Violence: An Empirical Picture in Context*, 12 J. MENTAL HEALTH 7, 7-10 (2003); Dep't of Health & Human Servs., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 7 [hereinafter SURGEON GENERAL'S REPORT].

[8] M. Clements, *What We Say About Mental Illness*, PARADE MAGAZINE, Oct. 31, 1993, at 3-6 (over 57% of Americans think mentally ill people are more likely to commit acts of violence than other people); *NMHA Poll Shows Myths and Misunderstanding Still Surround Mental Illness*, NMHA NEWS RELEASE, June 5, 1999, *available at* http://www.nmha.org/newsroom/system/ news.main.cfm ("43% believe that people with mental illness are more violent than the general population"); SURGEON GENERAL'S REPORT, *supra* note 7, at 6-9 (noting that public stigma concerning mental illness appears to be linked to concerns over violence).

mitigating factor that should weigh against the imposition of a capital sentence.

Another troubling consideration is that jurors will likely give particular weight to this questionable aggravating impulse because it concerns future dangerousness. The probability that a defendant will pose a threat to others in the future is a highly aggravating factor and one of the primary determinants of capital-sentencing outcomes. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559-1560 (1998). In jury deliberations, aggravating evidence of future dangerousness takes precedence over any mitigating evidence, including evidence of mental illness or the defendant's intelligence.[9] By contrast, lack of future dangerousness has only a minor mitigating role. *Id.* at 1560. By drawing attention to a factor that already strongly disposes many jurors toward the imposition of a death sentence, the structure of the pre-1991 Texas sentencing statute helps to eclipse mitigating evidence that is of uncertain relevance to the future dangerousness inquiry or that even suggests enhanced dangerousness. Absent a separate mitigating evidence special issue, the Texas sentencing scheme provides little in the way of a safety valve to ensure consideration of the mitigating aspects of mental disability evidence in death-penalty cases.

Finally, because there is often scientific disagreement about the diagnosis of a particular constellation of symptoms and the severity of a defendant's mental disability, it is even more likely that mitigating disability evidence will be obscured by the focus on future dangerousness. For

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[9] John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001).

example, the results of I.Q. tests can vary.[10] Another example is anti-social or asocial personality disorder, a condition that has been recognized in the medical literature for over a century, but which has consistently eluded a precise definition.[11]

In light of this scientific uncertainty, it is not unusual for the prosecution and the defense to put on conflicting expert witnesses in the punishment phase of a capital murder trial.[12] The only point of intersection in the clinical opinions of the experts may be that the defendant could be dangerous in the future. Thus, while the jury may be certain that the defendant will be dangerous, it may also be faced with conflicting expert testimony regarding the severity and effects of the defendant's mental disability, as well as the relationship of that disability to the crime. When confronted by a question specifically addressing future dangerousness without a countervailing mitigating evidence issue, the jury probably will be uncertain about how to apply evidence that the defendant likely poses a continuing threat in the future, but also suffers from a mental disability making him less culpable for his crime. As a result, the jury will be unable to

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[10] American Association on Mental Retardation, DEFINITION OF MENTAL RETARDATION, July 29, 2002, *available at* http://www.aamr.-org/Policies/faq_mental_retardation.shtml; Lyndsey Sloan, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 364 (2003).

[11] Aubrey Lewis, *Psychopathic Personality: A Most Elusive Category*, 4 PSYCHOLOGICAL MEDICINE 133-140 (1974), *reprinted in* CRIMINAL JUSTICE AND THE MENTALLY DISORDERED at 465 (Jill Peay ed., 1998).

[12] *See, e.g.*, *Atkins*, 536 U.S. at 309; *Penry I*, 492 U.S. at 309; *Robison v. Johnson*, 151 F.3d 256, 264 (5th Cir. 1998); *cf.* Raymond Bonner & Sara Rimer, *Mentally Retarded Man Facing Texas Execution Draws Wide Attention*, N.Y. TIMES, Nov. 12, 2000, at § 1, at 34 (recounting an interview with the prosecutor who tried Penry's case in which the prosecutor stated his belief that Penry was not retarded and had not been abused).

give full mitigating effect to a defendant's mental disability evidence under the future dangerousness issue.

2. The Deliberateness Question is Underinclusive and Vague.

The other Texas special issue asks whether the defendant acted deliberately. Unlike future dangerousness, this question does have some relevance to the concept of culpability. Nevertheless, the deliberateness question does not provide the jury with an opportunity to give full mitigating effect to mental disability evidence.

One reason is that "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Penry I*, 492 U.S. at 322. Thus, a reasonable juror could conclude that a defendant murdered his victim deliberately, while also concluding that the defendant had a mental disability that made his conduct less morally culpable than defendants who did not have that excuse. *Id.*; *see* Part I.A., *supra* (discussing relevance of various disabilities and contributing factors to culpability). Under these circumstances, however, the deliberateness issue would give the juror no vehicle for expressing her reasoned moral response that the defendant's disability diminished his culpability and made imposition of the death penalty unwarranted. *Penry I*, 492 U.S. at 323. Because the mitigating evidence of mental disability is relevant beyond the scope of the deliberateness issue, a separate mitigating evidence question is required.

A second reason that the deliberateness issue does not allow for full consideration of mitigating evidence is that it is vague. Texas juries are not instructed about what the term "deliberately" means. *Id.* at 322. Because that term is not defined in a way that clearly directs the jury to consider fully a defendant's mental disability evidence as it bears on his personal culpability, courts cannot be sure that the jury is

able to give full effect to that evidence. *Id.* at 323. A separate mitigating evidence question is therefore required.

* * *

The aggregate impact of the foregoing factors can narrowly constrain or even eliminate the jury's ability to give mitigating effect to a defendant's mental disability evidence while almost compelling an affirmative answer to the future dangerousness special issue. Thus, a jury generally will need a separate mitigating evidence question to enable it to give full mitigating effect to mental disability evidence.

In these cases, each Petitioner presented mental disability evidence of his low I.Q. *Smith*, 311 F.3d at 681-83; *Tennard*, 284 F.3d at 596-97. For the reasons explained above, this evidence is relevant to their moral culpability and cannot be given effect under the pre-1991 special issues. Under *Penry I*, therefore, a remand for resentencing is required.

II. THE FIFTH CIRCUIT TEST IS CONSTITUTIONALLY FLAWED.

The Fifth Circuit concluded, however, that no separate mitigating evidence question was required because the Petitioners' evidence did not meet its two-part threshold test of "constitutional relevance." The Court should take this opportunity to make clear that the Fifth Circuit test is improper. That test impermissibly strays from the Court's inquiry in *Penry I* and *II* regarding whether the evidence can be given full mitigating effect under the existing special issues. The test suffers from several other flaws as well: its "handicap" and "nexus" requirements are contrary to this Court's cases; it misuses harmless error principles and usurps the jury's role; and it bucks the trend among the States toward separate mitigating evidence instructions.

A. The Fifth Circuit Has Strayed From the *Penry* Inquiry.

The principal error of the Fifth Circuit test is that it is not designed to answer the question prescribed by *Penry I*: whether the jury can give full effect to mitigating evidence concerning the defendant's moral culpability when answering the two Texas special issues. Instead, having decided to confine *Penry I* to its facts, the Fifth Circuit crafted narrow handicap and nexus requirements designed to capture only evidence similar to that offered by Penry himself. *Robertson*, 325 F.3d at 251-52. This approach suffers from a basic conceptual flaw: it depends on the assumption that evidence similar to Penry's is the only type of evidence that cannot be given effect under the two special issues.

That assumption is flatly wrong. As only one example, the discussion above shows that mitigating evidence of mental disabilities and the factors that contribute to them generally cannot be given effect under the special issues. Because the Fifth Circuit test disregards such mitigating evidence, labeling it "constitutionally irrelevant" even though it cannot be given effect under the special issues, the test should be disapproved.

The Fifth Circuit's suggestions to the contrary notwithstanding, its test has never been adopted by this Court. *Cf. Robertson*, 325 F.3d at 255-56. In *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), this Court ignored the Fifth Circuit test and instead examined whether the particular mitigating factor at issue was sufficiently addressed by the Texas special issues, reaffirming the basic test of *Penry I*. This Court's precedents neither require nor permit the additional threshold test invented by the Fifth Circuit.

The implications of the Fifth Circuit test are troubling, and confirm the conclusion that the test should be discarded. This is so especially from the perspective of a charge error

analysis. In essence, the Fifth Circuit test holds that even if a defendant's mitigating evidence cannot be given effect under the two special issues, the failure to submit a separate mitigating evidence question is not harmful error if that evidence is "constitutionally irrelevant" under its two-prong test. In other words, the Fifth Circuit's position is that a defendant's mitigating evidence is irrelevant and insufficient to support a "yes" answer to the question whether mitigating evidence warrants a sentence of life imprisonment rather than death unless that evidence meets the nexus and harm requirements. Given this Court's broad view of the types of evidence that are relevant to assessing the defendant's moral culpability, however, that position cannot be correct. *See* Part I.A., *supra*.

Moreover, the Texas trial court in *Smith* concluded that sufficient evidence had been offered to require a separate mitigating evidence instruction, and the Fifth Circuit should have respected that conclusion. Between this Court's 1989 decision in *Penry I* and the change of Texas law in 1991, the Texas Court of Criminal Appeals routinely measured a defendant's mitigation evidence against the facts of *Penry I* in order to determine whether the defendant was entitled to a separate instruction.[13] Thus, Texas courts applied a standard similar to the Fifth Circuit's narrow rule, rarely overruling a trial court's determination that a separate mitigation instruction was unnecessary. Yet when the Texas trial court

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[13] *See Ex Parte Ellis*, 810 S.W.2d 208, 212 (Tex. Crim. App. 1991) ("We conclude * * * that the mitigating evidence in this cause does not rise to the level of '*Penry* evidence' and no additional instruction was necessary for the jury to consider and give effect to this evidence."); *Ex Parte Baldree*, 810 S.W.2d 213, 217 (Tex. Crim. App. 1991) (rejecting that evidence of defendant's good character and kindness towards others required a separate mitigation instruction); *Black v. Texas*, 816 S.W.2d 350, 365 (Tex. Crim. App. 1991) ("After once again reviewing the evidence presented by appellant during punishment, we conclude that this mitigating evidence is qualitatively different from that in *Penry*.").

applied this standard to Smith's mitigating evidence, it decided to instruct the jury separately to take that evidence into account. Under AEDPA, the Fifth Circuit should have deferred to the state court's finding that the defendant presented relevant mitigating evidence requiring a separate instruction. 28 U.S.C. § 2254(d), (e). Because the instruction Smith received was defective under this Court's decision in *Penry II*, the Fifth Circuit should have granted him a new sentencing hearing under a correct instruction. Instead, it second-guessed the trial judge's conclusion about the sufficiency of the evidence, making its own evidentiary ruling that Smith's evidence was not sufficiently *Penry*-like. *Smith*, 311 F.3d at 680. That outcome is improper.

It should also be noted that Texas law has now been changed to require a mitigating evidence question to be given in all cases. This question carves out nothing as constitutionally irrelevant: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that the sentence of life imprisonment rather than a death sentence be imposed." TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(e) (Vernon Supp. 2002). Under the Fifth Circuit test, this statute is arguably unconstitutional because it gives the jury a vehicle to consider "constitutionally irrelevant" mitigating evidence that does not concern a uniquely severe permanent handicap or have a nexus to the crime. Yet that conclusion would be contrary to this Court's precedent, which recognizes that the new Texas statute appropriately ensures that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant * * *." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). For this additional reason, the Fifth Circuit test should be disapproved.

B. Evidence of a Uniquely Severe Permanent Handicap With a Nexus to the Crime Is Not Required.

Not only is the Fifth Circuit's threshold test inconsistent with *Penry I*, but the two components of that test have constitutional flaws of their own. The Fifth Circuit conditions the constitutional right to have a jury provide a reasoned moral response to mitigation evidence on whether that evidence demonstrates a uniquely severe permanent handicap and a nexus to the crime. In *Smith*, the Fifth Circuit found that the defendant's low I.Q. is not mitigating evidence because it is not a "uniquely severe permanent handicap." 311 F.3d at 682. In *Tennard*, the Fifth Circuit concluded that the defendant's evidence of his low I.Q. is not mitigating because "he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his I.Q. of 67." 284 F.3d at 597. Neither of these requirements can be sustained under this Court's precedent.

1. Uniquely Severe Permanent Handicap

The first prong of the Fifth Circuit's "constitutional relevance" test requires a defendant to show a "uniquely severe permanent handicap[] with which [he] was burdened through no fault of his own." Smith, 311 F.3d at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995)). The severity, permanence, and harm aspects of this handicap requirement are all flawed.

Severe: As the Fifth Circuit explains its handicap requirement, "we have found a *Penry I* problem to exist only where the petitioner presents mitigating evidence relating to either *severe* mental retardation or to *extreme* childhood abuse." *Smith*, 311 F.3d at 680 (emphasis added). Yet in *Penry I*, during the guilt/innocence phase of Penry's trial, evidence was presented that characterized Penry's mental state as anywhere from "mildly retarded" or "extremely limited mental ability" to an "anti-social personality." *Penry I*, 492 U.S. at 308-310. Nowhere did the Court characterize

Penry's mental retardation as "severe," nor his childhood abuse as "extreme."

The Fifth Circuit's requirement of a uniquely severe permanent handicap requires courts to ignore the jury's inability to give effect to mitigating mental disability evidence where that evidence is less than "severe." The inadequacy of this excessively restrictive reading of *Penry I* is apparent in light of this Court's recent decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* holds that the Eighth Amendment prohibits execution of the mentally retarded. Yet the Fifth Circuit reads *Penry I* as requiring an additional instruction on mitigating evidence only when that evidence includes severe mental retardation. *Robertson*, 325 F.3d at 251; *Smith*, 311 F.3d at 682 ("This court has repeatedly held that neither evidence of low I.Q. nor evidence of borderline retardation is sufficient to warrant a Penry instruction."). Therefore, under the Fifth Circuit's approach, the only defendants entitled to an additional instruction under the pre-1991 Texas death penalty statute are those who no longer need it. In essence, the Fifth Circuit has narrowed the scope of *Penry I* past the point that it vanishes into *Atkins* and loses any independent significance. This surely cannot be the rule.

The Fifth Circuit's "severe" handicap requirement also inappropriately discounts the role that childhood abuse may have on a defendant's state of mind and moral culpability. The link between childhood abuse and mental disability is not only well documented in the medical literature, but, as this Court has noted, intuitively obvious. *Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens."); Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1156, 1158 (1999).

By limiting *Penry I* to the particularly horrific circumstances of Penry's upbringing, the Fifth Circuit has ignored the fact that a multitude of factors beyond the severity of abuse can affect the degree of mental impairment an individual who is victimized as a child may suffer as an adult. *Id.* Other factors, such as individual susceptibility, whether the abuse is perpetrated by a caretaker, and the presence of other psychological, neurological, or cognitive disabilities may enhance the deleterious effects of childhood abuse. *Id.* at 1159-1160. The availability of external support facilities, intervention, and treatment may also significantly influence the degree of psychological trauma caused by childhood abuse. *Id.* at 1161. The trauma caused by childhood abuse, and the concomitant reduction in a capital murder defendant's moral culpability caused by this trauma, is not solely dependent on the severity of the abuse as the Fifth Circuit test restrictively holds.

Permanent: Turning to the "permanent" aspect of the handicap requirement, this qualification on the constitutional mandate of *Penry I* is contrary to this Court's jurisprudence on executing the mentally insane. Although mental insanity can be controlled with the use of medication, in *Ford v. Wainwright*, 477 U.S. at 409-410, this Court acknowledged that the Eighth Amendment prohibition against sentencing a defendant who is insane to death aims "to protect the dignity of society itself from the barbarity of exacting mindless vengeance." This Court did not rely on whether the mental illness was permanent or presented a nexus to the crime, but instead reasoned that sentencing the mentally insane to death "offends humanity" and offers no deterrent, retributive, or religious benefit. *Id.* at 407-08. The Fifth Circuit's permanency test, in essence, impermissibly asks whether a mentally ill defendant can be treated in order to be sentenced to death.

Even when a defendant's mitigating evidence of untreated mental illness does not rise to the level of insanity,

the availability of treatment may actually prevent him from obtaining a mitigating evidence special issue. In *Robison v. Johnson*, 151 F.3d 256, 265-66 (5th Cir. 1998), for example, the Fifth Circuit concluded that because the defendant's schizophrenia was in remission and could be controlled with medication in the structured environment of prison, the jury could give mitigating effect to evidence of the defendant's mental health problems under the future dangerousness special issue. Yet this analysis ignores a significant aspect of the mitigating value this type of mental disability evidence possesses. The moral culpability of a defendant whose mental illness was not under control at the time of his crime will be reduced even though the possibility of treatment may also reduce his dangerousness in the future. This moral relevance distinguishes mental disability evidence from the mitigating evidence presented in *Franklin* and *Jurek*. Franklin's ability to live in the structured environment of prison and Jurek's good character evidence had no relevance to their moral culpability for their crimes. The mitigating evidence in those cases was relevant only because of its relationship to the defendants' future dangerousness. The Fifth Circuit's willingness to ignore the implications of a defendant's mental disability to his moral culpability is inconsistent with this Court's holding that a defendant's individual moral culpability is the sine qua non of the punishment phase inquiry.[14]

[14] *See Penry I*, 492 U.S. at 319; *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (holding that "victim impact" evidence could be introduced during the punishment phase of a capital murder trial in order to allow the jury to fully consider all of the circumstances affecting the defendant's culpability); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (noting that the jury's sentencing determination should be based on its "reasoned moral response to the defendant's background, character, and crime").

Fault: Finally, by requiring that the criminal act be related to a "uniquely severe permanent handicap[] with which the defendant was burdened through no fault of its own," *Smith*, 311 F.3d at 680, the Fifth Circuit has conflated the sentencing phase of the trial with the guilt phase. Because "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question," capital murder trials are bifurcated. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). Criminal evidence and mitigation evidence are different. Although it is important to establish a nexus between the crime and evidence presented during the guilt phase of a capital murder trial, during the sentencing phase, mitigation evidence is important if it informs the jury's determination of the defendant's moral culpability.

The Fifth Circuit test so narrowly confines the entitlement to a mitigation instruction as practically to eliminate it. In effect, no mitigation question is required unless the mitigating evidence rises to the level of justification or excuse: an act that is "wholly"[1] attributable to a condition that burdens a defendant through "no fault" of his own is an excuse, like insanity or automatism. Yet it is hornbook law that excuse and mitigation are distinct legal concepts, serving entirely different functions. An excuse, like a justification, is considered in determining guilt or innocence. By contrast, mitigating factors are pertinent to determining whether a guilty defendant is nonetheless entitled to leniency.[15] By requiring mitigation instructions

[15] *See Spivey v. Zant*, 661 F.2d 464, 471 n.8 (5th Cir. 1981) (recognizing distinction of culpability from guilt or innocence and noting the relevance of circumstances "which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment") (citing *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977)); *see also* Phyllis

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only where the supporting evidence would suffice to establish a legal excuse, the Fifth Circuit's standard conflicts not only with these fundamental principles, but with the mandate of *Penry I*.

2. Nexus to the Crime

The second prong of the Fifth Circuit's test shifts the constitutional focus this Court placed on the defendant's culpability and misapplies *Penry I* to require "a nexus between the severe permanent condition * * * and the capital murder." *Tennard*, 284 F.3d at 597. As a practical matter, this nexus inquiry is flawed because the Fifth Circuit has not considered whether it is even possible for the scientific community to establish a direct link between crime and mitigating evidence of mental disabilities. *See* pp. 12-13, *supra*. Moreover, the nexus requirement is contrary to this Court's precedent.

This Court does not require the defendant to show a nexus between his mitigating evidence and the *crime*.[16] *See Eddings v. Oklahoma*, 455 U.S. at 115 (Court did not examine nexus between crime and mitigating evidence of youth, childhood abuse, and emotional problems before holding that sentencer was required to consider that

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L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 73, 75 (1997) (Fifth Circuit test conflates culpability and responsibility by restricting evidence in guilt phase to that which lessens culpability and requiring nexus between evidence of mental disability and commission of crime).

[16] Interestingly, the Sentencing Commission and federal courts have rejected a nexus requirement in the non-capital sentencing context, permitting a reduced sentence based on evidence of "reduced mental capacity" that does not have a direct causal link to the crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13; *United States v. Cockett*, 330 F.3d 706, 713-14 (6th Cir. 2003).

evidence). Instead, the relevant connection is between the defendant's mitigating evidence and his *culpability*. As *Penry I* shows, the concept of culpability is not limited to the circumstances of the crime itself. "[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record *or* the circumstances of the offense." *Penry I*, 492 U.S. at 327-28 (emphasis added). In fact, allowing the jury to give effect "only [to] mitigating evidence about the circumstances of the *crime*, and not evidence about the defendant's background and character," would be inconsistent with the "obligation to consider all of the mitigating evidence introduced by the [defendant]." *California v. Brown*, 479 U.S. at 842 (O'Connor, J., concurring).

In *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), the Court rejected the Fifth Circuit's narrow view of *Penry I*. The defendant in *Wiggins*, who was not mentally retarded, did have a history of childhood abuse that his attorneys failed to discover and present to the jury. Speaking for the Court, Justice O'Connor held this evidence of abuse was sufficiently important that the attorneys' omission amounted to ineffective assistance of counsel. *Id.* at 2533. The Court described the abuse as "powerful" mitigating evidence. *Id.* After reciting Wiggins' childhood abuse and rotten social background, the Court concluded that "Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Id.* at 2542 (citing *Penry I*, 492 U.S. at 319; *Eddings*, 455 U.S. at 112; and *Lockett*, 438 U.S. at 604); *see also* Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 340-342 (2002) (arguing that a defendant has a constitutionally protected right to present mitigating evidence of "rotten social background" and mental retardation). Thus, the Court did not interpret its language of "attribution" in

Penry I as requiring a nexus between the crime and the mitigating evidence. Rather, it focused on the relevance of the evidence to the defendant's moral culpability. This Court should disapprove the Fifth Circuit's "nexus" requirement.

C. The Fifth Circuit Test Misuses Harmless Error Principles and Usurps the Jury's Role.

Another constitutional infirmity of the Fifth Circuit test is that its purpose is to determine which *Penry I* errors are harmless. Even in circumstances where the jury instructions do not provide a vehicle for giving effect to the defendant's mitigating evidence, a remand for resentencing can be avoided if the Fifth Circuit test labels that evidence "constitutionally irrelevant."

This practice is impermissible. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor," neither may the court. *Penry I*, 492 U.S. at 318 (quoting *Eddings*, 455 U.S. at 113-14). "If mitigating evidence is relevant to the sentencing determination, a defendant has a right to have the jury consider it *even if an appellate court may question its weight*." *Franklin v. Lynaugh*, 487 U.S. at 191 (Stevens, J., dissenting) (emphasis added). Moreover, even if the Fifth Circuit insists on posing as the sentencer, this Court cautions that the sentencer is precluded from "refus[ing] to consider, *as a matter of law*, any relevant mitigating evidence." *Penry I*, 492 U.S. at 318.

Under *Penry I*, if the instructions do not allow the jury to consider and give effect to all mitigating evidence, an error occurs and remand for resentencing is compelled "so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 328 (quoting *Lockett*, 438 U.S. at 605); *see also Eddings*, 455 U.S. at 119 (O'Connor, J., concurring) (remand required "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [jury]"). "When the choice is between life and death, that risk is

unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry I*, 492 U.S. at 328 (quoting *Lockett*, 438 U.S. at 605).

A related flaw in the Fifth Circuit test is that it impermissibly narrows the breadth of evidence that *Penry I* instructs must be within a sentencing jury's reach. To analyze constitutional infirmities under this Court's holdings in *Penry I* and *II*, appellate courts need only determine whether the sentencing instructions given in a capital case provided an adequate vehicle for the jury to make a reasoned moral response to the defendant's mitigating evidence. It is the province of the jury in the first instance, not of a trial or appellate judge, to weigh the aggravating and mitigating factors that determine the imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002). As this Court held in *Eddings*, when the sentencer does not consider all relevant mitigating evidence, the proper remedy is to remand and allow it "to consider * * * and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for [it]." 455 U.S. at 117. Using the Fifth Circuit test to filter out "constitutionally irrelevant" evidence that the jury need not be instructed to consider dissolves the rights of capital defendants to have juries evaluate all evidence that mitigates against a death sentence.

D. The Fifth Circuit Test Bucks the Trend Toward Separate Instructions on Mitigating Evidence.

While the Fifth Circuit has been restricting the availability of a separate mitigation instruction under *Penry I*, the States have been moving in the opposite direction. In response to *Penry I*, the Texas Legislature amended the death penalty statute to pose a separate catch-all question on mitigation to the jury in every case. *See* TEX. CRIM. PROC.

CODE ANN. art. 37.071 § 2(e) (Vernon Supp. 2002).[17] Texas thus joined the long-standing practice in other States of permitting capital sentencing juries to consider any mitigating evidence they deem relevant.[18] Many States explicitly mention mental disability evidence as a relevant mitigating factor that jurors may consider.[19] Federal statutes

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[17] September 1, 1991, is the effective date of this amendment. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 2002). The 1991 amendment is applicable in all cases where the offense was committed after September 1, 1991. *Id.* at § 2(i). A subsequent enactment, effective September 1, 1993, was made applicable to all capital cases where the offense was committed before September 1, 1991. TEX. CRIM. PROC. CODE ANN. art. 37.0711 § 1 (Vernon Supp. 2002).

[18] "[C]urrent state sentencing schemes generally offer two vehicles for the consideration of mitigation evidence: a list of enumerated mitigating circumstances and a 'catch-all' phrase or its functional equivalent permitting the sentencer to consider all other potentially mitigating factors." Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 848 & n.65 (1992). Many of these schemes are based on the Model Penal Code's death penalty statute, which lists certain aggravating and mitigating factors but also allows the jury to consider "any other facts that it deems relevant." MODEL PENAL CODE § 210.6(2) (1985); *see* Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1209 & n.56 (2000).

In addition to Texas, there are at least six State statutes that contain only a "catch-all" phrase for mitigating evidence: DEL. CODE ANN. tit. 11, § 4209(c); GA. CODE ANN. § 17-10-30(b); IDAHO CODE § 19-2515(3)(b); NEV. REV. STAT. ANN. 200.035(7); OKLA. STAT. ANN. tit. 21, § 701.10(C); S.D. CODIFIED LAWS § 23A-27A-2(4).

[19] The recently-amended Illinois statute mentions mental or emotional disturbance, emotional or physical abuse, and reduced mental capacity as mitigating factors. 720 ILL. COMP. STAT. 5/9-1(c)(2), (6), (7), *as amended by* 2003 Ill. Legis. Serv. P.A. 93-605. Several other State statutes specifically mention mental development defects or mental illnesses as mitigating factors. *E.g.*, KY. REV. STAT. ANN. § 532.025(2)(b) ("the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation * * * [even though the impairment] is insufficient to constitute a defense to the crime"); N.Y. CRIM. PROC. LAW

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and sentencing guidelines, as well as the laws of other countries, also take the mitigating effect of mental disabilities into account.[20] This legislative judgment is important

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§ 400.27(9)(b) ("Mitigating factors shall include * * * the defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law impaired but not so impaired in either case as to constitute a defense to prosecution."); OHIO REV. CODE ANN. § 2929.04(B)(3) ("[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law.").

Many other State statutes refer more generally to the mitigating effect of "mental disturbance" evidence. *E.g.*, ARK. CODE. ANN. § 5-4-605; CAL. PENAL CODE § 190.3 ("mental condition" as well as "whether or not the defendant was under the influence of extreme mental or emotional disturbance"); FLA. STAT. ANN. § 921.141(6); KAN. STAT. ANN. § 21-4626; LA. CODE CRIM. PROC. ANN. art. 905.5(b); MISS. CODE ANN. § 99-19-101(6)(b); MO. REV. STAT. § 565-032.3(2); MONT. CODE. ANN. § 46-18-304(1)(b); N.H. REV. STAT. ANN. § 630:5 (VI)(a) ("defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired"); N.J. REV. STAT. § 2C:11-3c(5)(a); N.M. STAT. ANN. § 31-20A-6 (C); N.C. GEN. STAT. § 15A-2000(f)(2); 42 PA. CONS. STAT. ANN. § 9711(e)(2); UTAH CODE ANN. § 76-3-207(4)(b); VA. CODE ANN. § 19.2-264.4(B); WYO. STAT. ANN. § 6-2-102(j).

[20] 18 U.S.C. § 3592(a)(1) ("defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge"); 21 U.S.C. § 848(m)(1) (same); U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (downward departure for "significantly reduced mental capacity"). For a discussion of the European system of partially reducing culpability and punishment based on mental disability evidence, see Hans Kröber & Steffen Lau, *Bad or Mad? Personality Disorders and Legal Responsibility – The German System*, 18 BEHAV. SCI. & L. 679, 682-85 (2000), and George E. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability*, 62 J. CRIM. L. & CRIMINOLOGY 313, 321-24 (1971).

evidence of what the Eighth Amendment requires. *See Atkins*, 536 U.S. at 312, 321.

Despite the changes to the Texas statute, there are still compelling reasons to clarify the law in this area. As the Fifth Circuit noted, in the two years between *Penry I* and the effective date of the amendment in 1991, dozens of Texas capital defendants like Smith were tried with the "nullification" instructions later found inadequate in *Penry II*. *See Robertson v. Cockrell*, 325 F.3d at 249. Tennard and dozens of other defendants with mitigating evidence that could not be given effect through statutory special issues were sentenced, without even a *Penry II* "nullification" instruction, under the instructions found constitutionally inadequate in *Penry I*. By 1994, according to some estimates, *Penry* claims had been rejected by lower state and federal courts in Texas in 100 to 150 cases. Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 9 n.53 (1994). These defendants have a literal life-and-death interest in having this Court clarify the circumstances in which a separate mitigation instruction is required.

CONCLUSION

For the foregoing reasons, this Court should reject the Fifth Circuit's two-prong threshold test of "constitutional relevance" and adhere to the *Penry I* rule that a separate mitigating evidence question is required whenever the jury cannot give full effect to a defendant's mitigating evidence under the two Texas special issues. Applying this analysis, the Court should hold that Petitioners' juries could not give full effect to their mental disability evidence, and should reverse and remand these cases for new sentencing hearings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ROBERT SMITH,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, AND TASH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

Nos. 02-10038, 02-11309

ROBERT SMITH,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, AND TASH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[*]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), founded in 1876, is the Nation's oldest and largest interdisciplinary organization of profession-

[*] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

als in the field of mental retardation. AAMR has appeared as *amicus curiae* before this Court in numerous cases.

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of the United States), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW (BAZELON) is a national public interest organization founded in 1972 to advocate for the rights of children and adults with mental disabilities. Bazelon has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before the U.S. Supreme Court, most recently in *Olmstead v. L.C.*, 527 U.S. 581 (1999), as well as in right to refuse medication cases such as *Riggins v. Nevada,* 504 U.S. 127 (1992) and *Washington v. Harper*, 494 U.S. 210 (1990).

THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, with approximately 2,500 members worldwide, is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry.

TASH (previously known as The Association for Persons with Severe Handicaps) is an international association of people with disabilities, their family members, other advocates, and professionals concerned with human dignity, civil rights, education, and independence for all individuals with disabilities.

SUMMARY OF THE ARGUMENT

When this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), it did not eliminate or alter the central teaching of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry*): that jurors

must be given an unobstructed opportunity to evaluate relevant mitigating evidence about a capital defendant. Evidence that an individual defendant has a cognitive impairment** is vitally relevant to the evaluation by jurors whether death is an appropriate penalty.

The Fifth Circuit's formula of prerequisites that a defendant must satisfy before being accorded the jury consideration guaranteed by this Court in *Penry* is both unwarranted and unreasonable. Its requirement of a judicial pre-determination of a causal nexus between the disability and the crime strips the jury of its proper role in evaluating that crucial and contextually subtle question. The Court of Appeals' requirements that the disability be demonstrated to be permanent and "uniquely severe" are similarly unjustified.

A cognitive impairment shapes the individual's understanding of the world and his ability to function in life. Whether its source is a traumatic brain injury, dementia incident to another medical condition, or an intellectual impairment that places the defendant outside the definitional boundary of mental retardation, the opportunity to consider its mitigating significance in determining whether a defendant should be executed is central to the jury's function.

The obstacles placed by the Fifth Circuit in the path of jurors' fair consideration of a defendant's condition are inconsistent with this Court's teachings about the fundamental importance of the jury's role in determining the appropriate penalty in capital cases.

** *Amici* use the term "cognitive impairment" or "cognitive disability" throughout this brief to describe several disabilities involving substantially impaired intellectual functioning, including traumatic brain injuries, various forms of dementia, and intellectual impairment which fall short of the definition of "mental retardation."

ARGUMENT

I. IMPOSING BARRIERS TO PREVENT JURORS FROM CONSIDERING MITIGATING MENTAL DISABILITY EVIDENCE IS UNJUSTIFIABLE.

Central to the Eighth Amendment's protection in capital cases is the opportunity for jurors to weigh the significance of mitigating evidence, enabling them to evaluate the appropriateness of imposing the death penalty. Denying jurors the opportunity to give meaningful consideration to such evidence prevents them "from giving independent mitigating weight to aspects of the defendant's character" and "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Perhaps the most widely recognized example of such mitigation is evidence of a defendant's cognitive disability, "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The principle reflected in this societal understanding about mental disability led this Court to require States to give jurors a meaningful opportunity to consider evidence of a defendant's mental retardation. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry*). This same principle prompted an increasing number of States to categorically prevent the imposition of the death penalty on defendants with mental retardation, and culminated in this Court's recognition of the existence of a national consensus against the practice. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

While the Eighth Amendment's categorical protection announced in *Atkins* is limited to defendants who have mental

retardation, the relevance of the *mitigating* significance of mental disability evidence recognized in *Penry* is not. Capital jurors weighing the fate of defendants who present evidence of substantially impaired intellectual functioning must be afforded an unimpeded opportunity to consider whether the individual's mental impairment makes him less culpable than defendants who have no such excuse. Any rule that denies jurors this critical opportunity should be supported by an exceedingly persuasive justification, and the Fifth Circuit has offered none.

A. The Fifth Circuit's Requirements Effectively Precluding Jury Consideration Of Substantial Cognitive Disabilities Are Unwarranted.

The Fifth Circuit has created a test that keeps relevant mitigating evidence of a defendant's cognitive disability from the jury. The Court of Appeals characterized the holding in *Penry* as providing an opportunity for the jury to consider mitigating evidence "because these characteristics were due to the uniquely severe permanent handicaps with which the defendant [Penry] was burdened through no fault of his own." *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993). This description of the evidence submitted by Penry and the rationale for its consideration in his case was then reified into a prerequisite for any defendant seeking an instruction permitting jury consideration of mitigating evidence. *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994). Unless evidence of mental impairment offered by a defendant falls within this "narrow class," *Robison v. Johnson*, 151 F.3d 256, 263 (5th Cir. 1998), jurors are precluded from evaluating its potentially mitigating significance outside the confines of the special questions of the then-applicable Texas statute.

While mental retardation is a "permanent" and substantial disability, which is experienced by affected individuals "through no fault of their own," it does not logically follow

that all other cognitive impairments that are not perfectly identical, in every respect, to mental retardation are unworthy of jury consideration as potentially mitigating evidence. Each component of this screening "test," devised by the Fifth Circuit in *Madden* to prevent the consideration of mental disability evidence, is deeply problematic.

The Fifth Circuit's requirement that a disability must be found to be "uniquely severe" before a jury can consider it is both unclear and unwarranted. If the intention in using the word "unique" is to assert that the reasoning of this Court's opinion in *Penry* has no possible relevance or applicability to evidence of any cognitive impairment other than mental retardation, then the requirement is merely tautological.[1] If, on the other hand, the Fifth Circuit's intention is to suggest that no other form of mental disability is even remotely comparable to the impairment experienced by people with mental retardation, then it is obviously in error. For example, an individual with a cognitive disability that manifested itself in adulthood (such as a traumatic brain injury, or dementia associated with Alzheimer's disease or the later stages of AIDS) would not satisfy the definition of mental retardation in most States,[2] yet the disability can be equally severe and disabling. It defies reason to contend that such an individual is so fundamentally dissimilar from someone with mental

[1] Of course, if the principles announced in *Penry* are inapplicable to any condition except mental retardation, then this Court's decision ceased to have any significance, since, under *Atkins*, people with mental retardation are now ineligible for the death penalty. Nothing in either *Penry* or *Atkins* suggests such a result.

[2] Although most statutory definitions of mental retardation limit its scope to disabilities which arose "during the developmental period," *e.g.*, CONN. GEN. STAT. § 1-1g(a) (2000); *Atkins*, 536 U.S. at 309 n.3, at least two States focus solely on the individual's intellectual deficit and its impact on adaptive behavior, without reference to the age of the disability's onset. NEB. REV. STAT. § 28-105.01(3) (Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie Supp. 2000).

retardation as to preclude a *Penry* instruction. Similarly, an individual whose measured intelligence indicates a substantial impairment falling just short of the threshold of mental retardation will encounter most of the same limitations as a person who has mental retardation.[3] To deny such a defendant's jury the opportunity to evaluate the mitigating significance of his disability is fundamentally incompatible with the reasoning of *Penry*.[4]

The Fifth Circuit's insistence that a defendant's disability, in order to be evaluated by a jury, must be "permanent" is equally unwarranted. It is certainly true that for most individuals, mental retardation is a lifelong condition,[5] and it is also true that a number of other cognitive disabilities can be

[3] *See generally* M.K. Simpson & J. Hogg, *Patterns of Offending Among People with Intellectual Disability: A Systematic Review. Part II: Predisposing Factors*, 45 J. Intell. Disability Res. 397, 402 (2001) ("the association between offending and intellectual ability appears to be strongest in the borderline range").

[4] As indicated above, this Court's holding in *Atkins* requires defining the scope of exemption from the death penalty. There is no comparable necessity, or even rationale, for arbitrarily denying other defendants with cognitive disabilities the opportunity for individualized culpability assessment guaranteed in *Penry*.

[5] As this Court has noted, the definition of mental retardation requires both a significant intellectual impairment (placing the individual at least two standard deviations below the mean in measured intelligence) and an impact of that impairment on the individual's ability to function in society. *See Atkins*, 536 U.S. at 309 n.3; *Penry*, 492 U.S. at 308 n.1. *See generally Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) ("reduced ability to cope with and function in the everyday world"). While we lack the technology to measurably increase an individual's basic cognitive ability, providing appropriate supports may allow some individuals to improve their ability to function in society to a level that is no longer consistent with the definition of mental retardation.

similarly enduring.[6] But a disability's permanence or impermanence has no bearing on its appropriate consideration as potentially mitigating evidence. The potential relevance of a defendant's mental disability to the sentencing process is the light it may shed on the individual's culpability at the time of the offense. *Penry*, 492 U.S. at 323; *Atkins*, 536 U.S. at 319. Whether the defendant was similarly impaired at some other point in time may help evaluate the legitimacy of the disability claim,[7] but it does not directly illumine the individual's level of culpability. Indeed, under both principles of *mens rea* and the defense of insanity, a temporary mental condition at the time of the offense, if sufficiently disabling, may preclude conviction altogether.[8] The Court of Appeals has offered no justification for arbitrarily denying jurors the opportunity to weigh the significance of such a disability for the much more limited (but incontrovertibly momentous) purpose of choosing between death and life as a punishment.[9]

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[6] *See, e.g.*, Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 152 (4th ed., text rev. 2000) ("Dementia may be progressive, static, or remitting.") [hereafter "*APA, DSM-IV-TR*"].

[7] For example, if there is documentation of the disability at an earlier stage of the individual's life, it may help dispel any concerns by the jury that a defendant may be malingering, and, similarly, the persistence of the disability past the time of the offense may permit clinicians to conduct a more thorough psychological evaluation. But the unavailability of such evidence is unrelated to the *relevance* of the individual's disability.

[8] *See, e.g., Beardslee v. United States*, 387 F.2d 280, 293 (8th Cir. 1967). *See generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 75 n.307 (1997).

[9] While the Fifth Circuit provides no justification for limiting the availability of *Penry* instructions to cases involving "permanent" cognitive disabilities, its purpose may have been to draw a distinction between mental retardation and a defendant's youth. *See generally Johnson v. Texas*, 509 U.S. 350, 368-69 (1993). But as this Court explained, youth is uniquely amenable to being considered under the special question of future dangerousness precisely because jurors would instinctively recognize the

It is similarly unjustified to insist that a defendant must demonstrate that he played no role in the etiology of his cognitive disability before the issue can be considered by a jury. Once again, the Fifth Circuit has singled out an attribute of mental retardation (as described in *Penry*), and generalized it into a prerequisite hurdle before a *Penry* instruction can be given in cases involving other cognitive disabilities. It is true that most defendants who have a substantial cognitive impairment acquired their disability without any personal responsibility for its occurrence.[10] But the fact that this is true of defendants with mental retardation, and of most individuals with other significant cognitive impairments, does not justify its imposition as an obstacle barring jurors' full consideration of the potentially mitigating significance of other defendants' cognitive disabilities. For example, an individual who has a substantial cognitive disability resulting from an earlier traumatic brain injury should be able to have it considered by a jury regardless of the precise cause of his injury.[11] If jurors concluded that a particular defendant's role

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relevance of its quintessential impermanence. *Id.* By contrast, other cognitive disabilities are like the mental retardation evidence in *Penry*, in that the jury cannot have confidence that the defendant will have an opportunity to emerge from its effects later in life and thereby to learn from his mistakes. Requiring the defense to *prove* the permanence of the disability before the jury can be given an opportunity to consider its mitigating potential serves no identifiable purpose.

[10] *See generally* Seymour L. Halleck et al., *The Use of Psychiatric Diagnoses in the Legal Process: Task Force Report of the American Psychiatric Association*, 20 Bull. Am. Acad. Psychiatry & Law 481, 494 (1992) ("Patients are generally not held responsible (in clinical interactions) for symptoms associated with cognitive impairments. . . .").

[11] For example, if an individual's traumatic brain injury resulted from an earlier motor vehicle accident, it should not matter, in deciding whether to give a *Penry* instruction in a capital case, if the defendant bore some responsibility for the original accident (e.g., a determination regarding comparative negligence in a tort action arising from the accident, or a determination that defendant should have been wearing a helmet while

in the etiology of his disability was relevant to its mitigating significance, they could, of course, impose the death penalty.[12] But there is no justification for placing the question beyond their "effective reach." *Cf. Graham v. Collins*, 506 U.S. 461, 475 (1993).[13]

Each of these component parts of the Fifth Circuit's barrier to the jury's reasoned evaluation of mitigating evidence of a defendant's cognitive impairment is loosely connected to *Penry* only in the sense that each is a characteristic of mental retardation. But none of these components negates the rele-

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riding a motorcycle). *See generally Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) ("In the end, the [statutory] disability definition does not turn on personal choice.").

[12] The intuitive expectation that jurors will be more sympathetic to mitigating circumstances that affected a defendant's culpability through no fault of his own appears to be borne out by social science research. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998). But this observation does not support the contention that mitigation claims where the defendant's complete lack of responsibility for his condition is not proven to a judge must be withheld from jurors' consideration. Rather, it suggests that jurors are fully capable of evaluating whether a particular defendant's cognitive disability, in light of all the evidence presented, renders the death penalty inappropriate.

[13] As was true with "unique severity" and "permanence," the Fifth Circuit has failed to provide a rationale for this "nonresponsibility" limitation, but it seems likely that the intention was to preclude consideration of impairments caused by a defendant's voluntary use of alcohol or illegal drugs. The issues surrounding the relevance of such substance abuse to criminal sentencing has been widely debated for many years. *See, e.g.*, MODEL PENAL CODE § 210.6(4)(g) (1985); *Hardwick v. Crosby*, 320 F.3d 1127, 1167-69 (11th Cir. 2003); *People v. Leger*, 597 N.E.2d 586, 611 (Ill. 1992); *U.S. Sentencing Guidelines Manual* §§ 5H1.4, 5K2.13 (amended October 27, 2003). But concern about that separate and distinct issue provides no justification for a generalized and imprecisely-targeted requirement that all defendants demonstrate that they had nothing to do with the origin of their cognitive impairment before that disability can even be considered by a jury.

vance of a defendant's cognitive limitation to his individual culpability. And none of them renders the defendant's disability more amenable to fair consideration within the confines of the special questions framework at issue here.

B. The Fifth Circuit's "Nexus" Or "Causation" Requirement Is Both Unjustified And Unworkable.

Under the prerequisites imposed by the Fifth Circuit, a defendant is denied an opportunity to have a jury consider the mitigating significance of his cognitive disability unless he has satisfied a judge of the adequacy of a causal "nexus" between the crime and the disability. *Madden*, 18 F.3d at 307. As was the case with the categorical restriction of eligible disabilities, there may be a superficial attractiveness to requiring some demonstrated connection between a defendant's disability and the offense, but, upon closer inspection, the Fifth Circuit's limitation on the jury's consideration of the issue proves to be unwarranted.

Although the law frequently confronts complex questions of causation,[14] none is more difficult than determining when an attribute of a defendant's background or cognitive limitations "caused" the behavior which constitutes the offense for which he is prosecuted. And when the law has attempted to address this issue in a fashion that is too reductionist and simplistic, it has encountered unsatisfactory results.[15] Because of the intricate relationship between

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[14] *See generally* Wayne R. LaFave, *Criminal Law* § 6.4 (4th ed. 2003); RESTATEMENT (SECOND) OF TORTS §§ 431-32 (1965); H.L.A. Hart & A. M. Honoré, *Causation in the Law* (1959); Michael S. Moore, *Causation and the Excuses*, 73 Calif. L. Rev. 1091 (1985).

[15] *See, e.g., Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). *See also* Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, *Psychological Evaluations for the Courts* 197-98 (2d ed. 1997).

individual mental characteristics and human behavior, the Fifth Circuit's insistence on demonstrating a causal nexus before the jury is permitted to evaluate evidence of a defendant's cognitive limitations can fare no better.

The criminal law seldom encounters cases in which a defendant's circumstances or mental disability has rendered his behavior inevitable, in the sense that anyone who had that condition would have acted identically.[16] Nor can it ever be demonstrated that only a person who shared defendant's condition would have committed this particular offense. But just because the connection between a cognitive impairment and the commission of a crime does not fit neatly into a "but-for" explanation does not eliminate the often powerful relevance of that disability in understanding an individual's actions.

A defendant's cognitive impairment can be vitally important in assessing the level of culpability for his offense. The disability may help us understand the individual as "less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).[17] But determining whether, in a particular set of circumstances, his action is "attributable" to his impairment, *id.*, will call for

[16] *See generally* Antony Honoré, *Principles and Values Underlying the Concept of Causation in Law*, in *Causation in Law and Medicine* 3, 5 (Ian Freckelton & Danuta Mendelson eds., 2002) ("In the world of physics we can specify rather precisely what conditions will lead to what outcomes. . . . Organic matter is less easy to analyse in terms of causal sequences because living creatures are complex. Members of a species do not react in a uniform way.").

[17] M.K. Simpson & J. Hogg, *supra* note 3, at 401-02 ("[P]ersonal and social problems tend to be cumulative. This makes any attempt to identify which factor causes any other almost impossible, and the attempt possibly unhelpful.").

thoughtful assessment *by the jury* of a wide variety of factors.[18]

The connection between a defendant's cognitive impairment and his actions derives from the limitations imposed by the disabling condition.[19] A person with such an impairment has an understanding of the world (and of his actions) that is altered, and often distorted, by the prism of his disability. Its profound and pervasive effects on his experiences and abilities in life, including his moral reasoning and understanding of the consequences of his actions, are not directly identifiable from a telltale indication on a diagnostic imaging of his brain, nor are they marked by some "behavioral chromosome" that can be detected through an analysis of his DNA. But the fact that the link between an individual's cognitive impairment and his behavior cannot be conclusively

[18] *Amici* do not, of course, mean to suggest that the issue of causation is irrelevant to the mitigating consequence of a defendant's disability. Obviously, the reason a defendant's disability matters in sentencing is that it helps the sentencer understand the defendant's act. *See generally U.S. Sentencing Guidelines Manual* § 5K2.13 (requiring, for a downward departure, that "the significantly reduced mental capacity contributed substantially to the commission of the offense"). But under the federal Guidelines, the judge is the sentencer. Our concern is with the Fifth Circuit using the "causation" or "nexus" prerequisite finding to keep the sentencer in Texas capital cases, the jury, from considering the relevance of the defendant's disability.

[19] While, as a general matter, this conclusion will also be true for defendants with mental illness, there may be some cases in which an individual's conduct may be more directly traceable to an attribute of his mental disease. For example, a defendant who offers evidence that his crime was in response to a command hallucination (which was an acute symptom of his psychotic illness) can be thought of as offering to demonstrate that his conduct was a "product" of his mental condition. By contrast, individuals with mental retardation and other significant intellectual impairments are not "required" by their condition to behave in a precise way. Rather, their actions in life are profoundly influenced by their level of understanding and ability to make reasoned choices.

demonstrated by such direct and concrete evidence does not make it any less real. Nor does it lessen its relevance to the jury's task of assessing mitigating circumstances in determining an appropriate punishment.

Persons who have substantial cognitive impairments are no more "predestined" to commit criminal acts than are those with mental retardation or any other mental condition.[20] In this sense, a defendant will *never* be able to prove a perfect causal nexus to the crime. But the interplay between an individual's mental disability and human volition is both contextual and complex. It does not admit of a simplistic yes-or-no judicial formula. The impact of a person's cognitive disability, and how it has shaped his functioning in everyday life, will inevitably have a powerful influence on his behavior. In this sense, there will *always* be a relevant "nexus" between the defendant's cognitive impairment and the offense.

The Fifth Circuit's requirement that a causal connection be demonstrated *before* a jury can consider the potentially mitigating significance of a defendant's cognitive disability is unwarranted. In an effort to satisfy this prerequisite, clinical witnesses may be asked to opine conclusively on the causal connection. Given the intricacy of the relationship between a disability and the defendant's behavior, such testimony would be of questionable value.[21] More fundamentally, no valid purpose is served by requiring such testimony in pursuit of advance "proof" of the connection before it can be evaluated

[20] It is noteworthy that while this Court clearly understood that Johnny Penry's mental retardation was relevant to determining the appropriate penalty for his crime, it did not require that he demonstrate a "nexus" in order to obtain a jury instruction that would allow a jury to evaluate its significance. Similarly, the protection from the death penalty recognized by this Court in *Atkins* was not limited to those defendants who prove that their mental retardation "caused" their crimes.

[21] *See* Halleck et al., *supra* note 10, at 494.

by a jury. The Fifth Circuit has offered no justification for this requirement.

C. Jurors Must Be Allowed To Evaluate The Mitigating Relevance Of Any Significant Impairment Of Cognitive Functioning.

People who have substantially impaired cognitive functioning have many relevant characteristics in common with individuals who have mental retardation.[22] The measurement of their IQs may be nearly as (or comparably) severe, but more significantly, the level at which they perceive and understand the world and function in society, as well as their experiences in life, have crucial parallels to the lives of people with mental retardation.

[22] There are three possible reasons why such individuals do not fall within the definition of mental retardation. Some will be outside the definition because their disability first manifested in adulthood (i.e., beyond the "developmental period"). This would include disabilities arising from brain injuries and dementias that occurred after childhood. Others will be outside the definition if, because of successful provision of supports, their adaptive behavior is no longer impaired enough to constitute mental retardation. (While such people exist in society, *see* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 9, 145-68 (10th ed. 2002) [hereafter "*AAMR 2002*"], in the experience of *amici*, they are seldom encountered in the criminal justice system.) Still others will be outside the definition because their measured intellectual impairment places them above the boundary of mental retardation. In this subgroup, *amici* are referring to impairments between one and two standard deviations below average (i.e., with IQ scores roughly between 85 and the low- to mid-70s). *See infra* note 23. *See also* Ruth Luckasson, *The Criminal Justice System and People with Mild Cognitive Limitations*, in *The Forgotten Generation: The Status and Challenges of Adults with Mild Cognitive Limitations* 347, 348-49 (Alexander J. Tymchuk, K. Charlie Lakin & Ruth Luckasson eds., 2001) [hereafter "*Forgotten Generation*"].

Individuals with cognitive impairments that place them above the boundary of mental retardation[23] share many of the

[23] *Amici* respectfully suggest that the term "borderline" is problematic in discussing these individuals. Despite its apparent aptness, it has considerable potential for confusion because of its multiple meanings in the clinical literature. For a relatively brief period of time (roughly the 1960s) the definition of mental retardation encompassed people whose IQ was between one and two standard deviations below the mean, and this group was denominated "borderline retarded." *See* Am. Ass'n on Mental Deficiency (now renamed AAMR), *A Manual on Terminology and Classification in Mental Retardation* 3, 86 (1961). This classification system proved unsatisfactory because it was perceived as unnecessarily stigmatizing the individuals so labeled, and in all subsequent revisions, the definition of mental retardation has identified the boundary as two standard deviations. *E.g.*, Am. Ass'n on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 18 (1973 rev.). *See generally AAMR 2002*, *supra* note 22, at 26-27. (Obviously, abandoning the classification of "borderline retarded" did not change the actual impairment those individuals experienced, but merely attempted to spare them an undesirable source of stigmatization. Andrea Zetlin & Michael Murtaugh, *Whatever Happened to Those with Borderline IQs?*, 94 Am. J. Mental Retardation 463 (1990); Luckasson, *supra* note 22, at 352.) Courts have frequently used the term in inconsistent and confusing ways, sometimes describing as "borderline" individuals whose disability would have placed them in that category in the earlier system, and at other times, using the same term to describe people who *are* within the current definition of mental retardation, but whose disability places them relatively near the boundary (i.e., two standard deviations).

To further confuse matters, "borderline" is also a mental illness term used by psychiatrists and other clinicians to describe a form of mental *illness* that bears no relationship at all to the intellectual impairments at issue in this case. *See generally APA, DSM-IV-TR*, *supra* note 6, at 706-710; Michael H. Stone, *The Fate of Borderline Patients: Successful Outcome and Psychiatric Practice* 9-11 (1990).

For somewhat different reasons, care is also appropriate in the use of the term "mild mental retardation." When professionals in the field employed a descriptive classification of intensity, they chose "mild," "moderate," "severe," and "profound" as the labels for subgroups of people with mental retardation. Under that taxonomy, roughly 90% of the individuals who fall within the definition of mental retardation were

life experiences of people with mental retardation.[24] They face similarly difficult conditions in terms of employment,[25] health care,[26] and education.[27] They also share an increased

labeled as having "mild" mental retardation. (That frequency is even higher among individuals facing criminal prosecutions.) Unlike the term "borderline," *all* of the individuals described as having "mild" mental retardation fall *within* the definition of mental retardation, and thus all come under the protection of *Atkins*. Although some clinicians continue to employ it, the "mild/moderate/severe/profound" descriptive system has been rejected by AAMR for more than a decade, in part because of its overemphasis on IQ scores (as compared to an individual's practical disabilities), and also out of concern about the misleading impression left by the term "mild." *AAMR 2002*, *supra* note 22, at 26, 207.

[24] *See* Glenn T. Fujiura, *Continuum of Intellectual Disability: Demographic Evidence for the "Forgotten Generation,"* 41 Mental Retardation 420, 426 (2003).

[25] Alexander J. Tymchuk, *Family Life: Experiences of People with Mild Cognitive Limitations*, in *Forgotten Generation*, *supra* note 22, at 249 ("The majority of individuals with mild cognitive limitations live in poverty because they are either unemployed or employed in low-paying jobs.").

[26] Deborah M. Spitalnik & Sheryl White-Scott, *Access to Health Services: Improving the Availability and Quality of Health Services for People with Mild Cognitive Limitations*, in *Forgotten Generation*, *supra* note 22, at 203, 206 ("Individuals with mild cognitive limitations as well as people with more severe disabilities are at a medical disadvantage and share similar disincentives to health care. These disincentives include lack of access to care, nonexistent or unavailable medical histories, fragmentation of medical care, lack of trained health professionals in the area of disabilities, lack of transportation, and lack of continuity of care.").

[27] Donald L. MacMillan et al., *Current Plight of Borderline Students: Where Do They Belong?*, 33 Educ. & Training in Mental Retardation & Developmental Disabilities 83, 92 (1998) ("Differences between borderline and average ability referred students were far more pronounced than differences between borderline and students with mental retardation."); *id.* ("We believe that these results argue for 'differences of degree rather than kind' when we talk about children ranging in IQ from the mid-60s to the mid-80s.").

likelihood of experiencing cognitive and behavioral difficulties associated with very low birthweight or the effects of fetal exposure to alcohol.[28]

As with people who have mental retardation, the combination of their cognitive disability with abuse and other problems in childhood can compound the difficulties they encounter as adults.[29] And the same problems can coexist with (and, ironically, can mask) mental illness and other psychological problems.[30] Similarly, these individuals also experience the difficulties to coping and succeeding in life

[28] Glen P. Aylward, *Cognitive and Neuropsychological Outcomes: More than IQ Scores*, 8 Mental Retardation & Developmental Disability Research Reviews 234, 239 (2002); Campbell M. Clark et al., *Structural and Functional Brain Integrity of Fetal Alcohol Syndrome in Nonretarded Cases*, 105 Pediatrics 1096, 1096-97 (2000); Kimberly A. Kerns et al., *Cognitive Deficits in Nonretarded Adults with Fetal Alcohol Syndrome*, 30 J. Learning Disabilities 685 (1997); Sarah N. Mattson et al., *Teratogenic Effects of Alcohol on Brain and Behavior*, 25 Alcohol Res. & Health 185 (2001).

[29] *See generally* Stephen A. Richardson, Helene Koller & Mandy Katz, *Relationship of Upbringing to Later Behavior Disturbance of Mildly Mentally Retarded Young People*, 90 Am. J. Mental Deficiency 1 (1985); Iris Tan Mink, C. Edward Meyers & Kazuo Nihira, *Taxonomy of Family Life Styles: II. Homes with Slow-Learning Children*, 89 Am. J. Mental Deficiency 111, 116 (1984). *See also Penry*, 492 U.S. at 319-28.

[30] *See* Philip G. Rourke & Donald M. Quinlan, *Psychological Characteristics of Problem Children at the Borderline of Mental Retardation*, 40 J. Consulting & Clinical Psychology 59, 60 (1973); Steven Reiss, *People with a Dual Diagnosis: America's Powerless Population*, in *Forgotten Generation, supra* note 22, at 275; Sharon A. Borthwick-Duffy & Richard K. Eyman, *Who Are the Dually Diagnosed?*, 94 Am. J. Mental Retardation 586, 591-92 (1990) (reporting greater incidence of mental illness and aggressive behavior at higher IQ levels among cognitively impaired individuals); Steven Reiss, Grant W. Levitan & Joseph Szyszko, *Emotional Disturbance and Mental Retardation: Diagnostic Overshadowing*, 86 Am. J. Mental Deficiency 567 (1982).

imposed by reduced cognitive ability.[31] These problems, in turn, are often exacerbated by the stigmatization the individuals experience from being identified as having mental disabilities.[32] And while all of these effects can be lifelong, the clinical literature strongly suggests that these problems are experienced most acutely in late adolescence and young adulthood, particularly in the process of transition from school life.[33]

Defendants with other forms of substantial cognitive impairments, who may also be denied *Penry* instructions under the Fifth Circuit's test, present similar issues. In particular, individuals with traumatic brain injuries,[34] various forms of dementia,[35] and some persons with epilepsy or

[31] *See generally* Harold G. Levine & L.L. Langness, *Everyday Cognition Among Mildly Mentally Retarded Adults: An Ethnographic Approach*, 90 Am. J. Mental Deficiency 18, 25 (1985).

[32] *See* Jim L. Turner, Keith T. Kernan & Susan Gelphman, *Speech Etiquette in a Sheltered Workshop*, in *Lives in Process: Mildly Retarded Adults in a Large City* 43, 60-68 (Robert B. Edgerton ed., 1984) (discussing intense negative reaction to mention of mental retardation).

[33] *See, e.g.*, Andrea G. Zetlin & Gale M. Morrison, *Adaptation Through the Life Span*, in *Handbook of Mental Retardation and Development* 481-503 (Jacob A. Burack, Robert M. Hodapp & Edward Zigler eds., 1998), and sources cited therein.

[34] *See, e.g.*, Marilyn F. Kraus, *Neuropsychiatric Sequelae: Assessment and Pharmacologic Interventions*, in *Traumatic Brain Injury* 173, 176-78 (Donald W. Marion ed., 1999) (discussing behavioral disturbances, aggression, and cognitive impairments); William W. McKinlay & Anna J. Watkiss, *Cognitive and Behavioral Effects of Brain Injury*, in *Rehabilitation of the Adult and Child with Traumatic Brain Injury* 74, 77-82 (Mitchell Rosenthal et al. eds., 3d ed. 1999).

[35] *See, e.g., APA, DSM-IV-TR* at 147-71; Nancy L. Mace, *The Management of Problem Behaviors*, in *Dementia Care: Patient, Family, and Community* 74 (Nancy L. Mace ed., 1990); Peter V. Rabins, Constantine G. Lyketsos & Cynthia D. Steele, *Practical Dementia Care* 156-70 (1999) (discussing mood problems, hallucinations, paranoia, and delusions); Myron F. Weiner & Linda Teri, *Psychological and Behavioral*

seizure disorders[36] may have comparable claims to an opportunity for jurors to consider the mitigating relevance of their disabilities.

II. THE OBSTACLES IMPOSED BY THE FIFTH CIRCUIT ARE INCONSISTENT WITH THIS COURT'S DECISIONS REGARDING MITIGATING EVIDENCE.

This Court has consistently emphasized the central importance of the consideration of mitigating evidence in evaluating whether the death penalty is warranted in an individual defendant's case. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Lockett*, 438 U.S. at 605.

Accommodating the Texas system of special questions to this constitutional principle has not been easy.[37] This Court found the structure of the Texas system to be constitutionally acceptable, in large part, because by "authorizing the defense to bring before the jury at the separate sentencing hearing *whatever mitigating circumstances relating to the individual defendant* can be adduced, Texas has assured that the

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Management, in *The Dementias: Diagnosis, Treatment, and Research* 181 (Myron F. Weiner & Anne M. Lipton eds., 3d ed. 2003).

[36] Oscar Doval, Moises Gaviria & Andres M. Kanner, *Frontal Lobe Dysfunction in Epilepsy*, in *Psychiatric Issues in Epilepsy* 261, 264-67 (Alan B. Ettinger & Andres M. Kanner eds., 2001) (discussing cognitive deficits and psychiatric symptoms); Alan B. Ettinger & Alan L. Steinberg, *Psychiatric Issues in Patients with Epilepsy and Mental Retardation*, in *id.* at 181, 185-86 (discussing impulse control disorders); Steven C. Schachter, *Aggressive Behavior in Epilepsy*, in *id.* at 201, 206 (citing studies suggesting aggressive or violent behavior may be due to side effects of anti-epileptic drugs).

[37] The issue posed in these cases appears to apply exclusively to Texas. Oregon, whose statute also incorporates the special question format, has determined that defendants are entitled to a jury instruction that invites consideration of all relevant mitigating evidence. *See State v. Wagner*, 786 P.2d 93, 101 (Or. 1990) (en banc).

sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis supplied). Over the years, the Court has found it necessary to resolve recurring questions about which types of mitigating evidence are amenable to fair consideration under this system and which types require a separate instruction regarding mitigation. *See Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in the judgment); *Penry*, 492 U.S. at 328; *Johnson v. Texas*, 509 U.S. at 369; *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (*Penry II*).

But as the Court has wrestled with these cases, it has always emphasized that the State cannot place important mitigating evidence beyond the jurors' effective reach. This Court has only rejected claims that the jury should have received an additional instruction when it was satisfied that a particular type of mitigating evidence could be unambiguously evaluated under the special questions.

The Fifth Circuit's *Madden* requirements, separately and in their aggregation, fail to recognize that other intellectual impairments are no more readily cognizable under the special question regime than was mental retardation. By excluding substantial impairments of cognitive functioning from its implementation of this Court's clear directive in *Penry*, the Fifth Circuit has consigned individuals with those disabilities to the same dilemma previously faced by defendants with mental retardation: the jury has been given no straightforward and unencumbered opportunity to consider the disability's mitigating significance.

III. JURORS MUST BE FREE TO PERFORM THEIR VITAL FUNCTION OF EVALUATING THE MITIGATING SIGNIFICANCE OF MENTAL DISABILITY EVIDENCE.

As this Court has emphasized, jurors must not only have an opportunity to *hear* relevant mitigating evidence, they must

be given a clear and logical opportunity to evaluate and *act upon* that evidence.[38] The Fifth Circuit's rule deprives jurors of such an opportunity in cases involving potentially powerful mitigating evidence of a defendant's substantially impaired cognitive functioning.

Other cognitive disabilities are no more amenable to fair evaluation within the context of Texas' special questions than mental retardation was in *Penry*. Like Penry's claim, such disabilities are incapable of full mitigating consideration under the "prospective dangerousness" question, because, exactly like mental retardation, they may be seen as a "two-edged sword" regarding future conduct.[39] The Fifth Circuit has offered no reasoning to demonstrate that this Court's concerns about jurors' ambivalent views about future

[38] Most State legislatures that have enacted statutes concerning mental retardation and the death penalty have recognized the importance of preserving the jury's role in evaluating mitigating evidence that has not been found to warrant exemption from the penalty. Some explicitly mention mental disability as a mitigating circumstance for cases in which the defendant has not been found to have mental retardation. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(C) (West Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2003); UTAH CODE ANN. § 77-15A-104(14)(c)(iii) (2003). *See also Murphy v. State*, 54 P.3d 556, 568 (Okla. Crim. App. 2002). Other States explicitly provide that an adverse ruling on the question of mental retardation may not be communicated to the jury which will consider mitigating evidence. 2003 CAL. LEGIS. SERV. 700 (West); IDAHO CODE § 19-2515A (Michie 2003); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie Supp. 2000).

[39] *Penry*, 492 U.S. at 324. Both reduced culpability and concern about future dangerousness were prominent themes in the era of eugenic approaches to cognitive impairments early in the 20th Century. *See, e.g.*, Henry Herbert Goddard, *The Criminal Imbecile: An Analysis of Three Remarkable Murder Cases* (1915). Although tragically misguided beliefs about both eugenic sterilization and segregation have been emphatically rejected in light of modern understanding of people with disabilities, it is noteworthy that even the harshest of those earlier views recognized the reduced culpability of the individuals described.

dangerousness are in any way different for other forms of cognitive impairment.

Yet despite jurors' concerns about future dangerousness, there is every reason to conclude that they would find these cognitive disabilities potentially mitigating in individual cases if offered a clear opportunity to consider them.

It is widely recognized that evidence regarding a defendant's mental impairment may be among the most persuasive mitigation evidence in jurors' estimation. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000). *See generally* Garvey, *supra* note 12, at 1564. While this evidence can be given focus by expert witnesses, jurors are likely to begin with an instinctive understanding that individuals with cognitive disabilities are less culpable for their acts than "defendants who have no such excuse." *Penry*, 492 U.S. at 322. Jurors' understanding of this basic truth will include portrayals of such individuals in literature and popular culture.[40] But in addition, in light of the increased educational opportunities for students with disabilities over the last twenty-five years,[41] jurors' life experiences are likely to include more interactions with people who have cognitive impairments than would have been true in earlier generations.[42]

[40] Such accounts will range from characters in literary fiction, such as *Of Mice and Men* and *Native Son*, to portrayals on television in programs like *L.A. Law* and *Life Goes On*, and films such as *Rain Man*, *Being There*, *Sling Blade*, and *Forrest Gump*. While these portrayals vary somewhat as to their precise clinical accuracy, they convey a basic understanding of how a disabled individual's intellectual limitations intersect with other aspects of their character and behaviors.

[41] *See generally* Education of All Handicapped Children Act of 1975, P.L. 94-142, now codified as Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.* (2000).

[42] *Cf.* Junean Krajewski & Thomas Flaherty, *Attitudes of High School Students Toward Individuals with Mental Retardation*, 38 Mental Retardation 154, 160 (2000).

But jurors' instinctive and experiential understanding about people with cognitive impairments cannot be given fair evaluation without an instruction that permits the disabilities to be considered. "A sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances. For it is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence."[43]

CONCLUSION

For these reasons, *amici* urge reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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[43] *Penry II*, 532 U.S. at 797 (emphasis in original) (internal quotations omitted).

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Nos. 02-10038, 02-11309

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In the Supreme Court of the United States

ROBERT JAMES TENNARD,

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v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ROBERT SMITH,

Petitioner

v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE TEXAS DEFENDER SERVICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

No. 02-11309

ROBERT SMITH,
Petitioner

v.

DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE TEXAS DEFENDER SERVICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Texas Defender Service and the National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of petitioners, Robert James Tennard and Robert Smith.[1]

[1] This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

This Court has observed that "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998), quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part). The Texas Defender Service (TDS) and the National Association of Criminal Defense Lawyers (NACDL) believe that this goal can be achieved only through competent representation of capital defendants and death row inmates at all stages of the trial and appellate process.

TDS is a private, non-profit law firm founded in 1995. Its mission is to help improve the quality of representation afforded to indigent Texans charged with a capital crime or under sentence of death. The firm's activities include: (1) directly representing death row inmates at all levels of the appellate process; (2) presenting free continuing legal education seminars with the assistance and support of the American Bar Association's Death Penalty Representation Project; (3) tracking the status of Texas death penalty cases and intervening in emergency situations or recruiting private law firms to represent Texas death row inmates and consulting with such firms; and (4) participating in efforts of groups and organizations to improve access to and quality of capital representation in Texas. TDS's primary interest in these consolidated cases concerns their impact on the administration of the death penalty system in Texas. Although the issues presented in these cases apply directly only in Texas and then only to a small percentage of current death row inmates there—namely, those convicted for offenses occurring before September 1, 1991 (when Texas revised the capital sentencing statute at issue)—the Court's decision may have important implications for capital cases more generally in Texas and elsewhere.

NACDL is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide. NACDL has 80 state and local affiliate organizations, with a total of 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year, including several in this Court, on a variety of criminal justice issues. See NACDL's website at www.nacdl.org.

SUMMARY OF ARGUMENT

A death sentence may be imposed only when the sentencer has been permitted to consider, and give effect to, the defendant's character, background, and record, and the circumstances of the offense. The Court has been clear that evidence of this nature may not be excluded from the sentencer's deliberations. Nor may the sentencer's reasoned moral response to this evidence be stifled by sentencing procedures that prevent the sentencer from forming and expressing its view, in light of all of the mitigating evidence presented, concerning whether death or a sentence less than death is appropriate.

The former Texas capital sentencing scheme, which applies to offenses committed prior to 1991, and under which petitioners were sentenced, made no reference to mitigating evidence and did not advise the sentencer to decide whether death is the appropriate sentence in light of all of the evidence presented. Instead, it only asked the jury to answer three

questions related to the deliberateness of the defendant's acts, the likelihood that the defendant would be a further danger to society, and the reasonableness of the defendant's reaction to any provocation by the victim. Although the Court has held that the former Texas capital sentencing statute is *facially* constitutional, it also has ruled that Texas' application of the statute in certain cases unconstitutionally deviated from the fundamental principles underlying the Court's capital sentencing jurisprudence: (1) all mitigating evidence must be allowed to be presented to the sentencer, and (2) the sentencer must be permitted to give full effect to all of the mitigating evidence in rendering its reasoned moral response to the defendant and his crime. In particular, the Court has held that where the mitigating evidence is relevant beyond the three questions presented in the former Texas capital sentencing scheme, the statute *as applied* does not result in a constitutional sentencing determination.

The Fifth Circuit has misinterpreted the Court's capital sentencing jurisprudence, particularly the Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), in adopting a restrictive approach that effectively confines *Penry* to its facts and that requires mitigating evidence to satisfy two limiting criteria before the adequacy of the special issues in the former Texas capital sentencing statute will even be considered. First, the Fifth Circuit has declared that the constitutional principles applied in *Penry* are implicated only when the defendant presents mitigating evidence of a permanent, severe handicap from which he suffers through no fault of his own. If the mitigating evidence can qualify under this demanding test, it then must be shown to have a causal connection or "nexus" to the murder for which the defendant was convicted. Only in these narrow circumstances—which the court of appeals has almost never found in the 14 years since *Penry* was decided—has the Fifth Circuit been prepared to acknowledge that the special issues in the former Texas

statute may not be adequate to permit the jury fully to consider and give effect to the defendant's mitigating evidence.

The court of appeals' repeated efforts, in the cases now before the Court and others, to cabin *Penry* and to insist on the sufficiency of the former Texas special issues in virtually every case, cannot be reconciled with *Penry* itself or with this Court's numerous capital sentencing decisions during the past 27 years. For well over a decade, Texas itself has not adhered to its previous flawed scheme but instead has required that juries in capital cases be asked explicitly whether the defendant's mitigating evidence warrants a sentence less than death. This Court now should confirm, in the clearest possible terms, that exclusive reliance on the former Texas special issues is constitutionally impermissible where a defendant presents mitigating evidence that has significance beyond the scope of those specific questions.

ARGUMENT

I. A DEATH SENTENCE MAY NOT BE IMPOSED CONSTITUTIONALLY UNLESS THE SENTENCER HAS BEEN AFFORDED THE OPPORTUNITY TO CONSIDER, AND PROVIDE A REASONED MORAL RESPONSE TO, THE UNIQUELY INDIVIDUAL CHARACTERISTICS OF THE CONVICTED PERSON.

This Court has long recognized that sentencing determinations require "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937). This is never more true than in a capital case, as "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) (plurality opinion);

Furman v. Georgia, 408 U.S. 238, 306 (1972) (per curiam) (Stewart, J., concurring) (The death penalty "is unique in its total irrevocability."). The irreversible nature of the death penalty requires that it be imposed only if, during the sentencing process, the convicted person is considered as a "uniquely individual human being[]." *Woodson*, 428 U.S. at 304 (plurality opinion).

More than just an "enlightened policy" drives the principle that sentencing determinations in capital cases must take into consideration the "character and record of the individual offender and the circumstances of the particular offense." *Id.* Rather, it is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

The requirement that the sentencer treat the defendant as a uniquely individual human being means that the sentencer must have a "'vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.'" *Penry v. Johnson*, 532 U .S. 782, 797 (2001) (*Penry II*) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*)). To ensure such a response, this Court has required that the jury have discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. Juror consideration of all factors touching on moral culpability has been the touchstone of this Court's individualization requirement. This is reflected in a number of decisions culminating in *Penry I*.

In seeking to ensure that the proper individualized sentencing occurs in a death penalty case, this Court has said that the sentencer should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character

or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604 (plurality opinion) (emphasis in original) (quoted with approval in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987)). This basic principle has led the Court to strike down mandatory death penalty statutes in whatever form they appear. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

For example, the Court held that the North Carolina statute at issue in *Woodson* "accord[ed] no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *See Woodson*, 428 U.S. at 303 (plurality opinion). The mandatory death sentence thus improperly excluded consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*[2]

But even when the sentencing authority is permitted to consider *some* mitigating evidence, the sentencing scheme still may fail to satisfy constitutional standards. For example, in *Lockett v. Ohio*, 438 U.S. at 607 (plurality opinion), the Ohio statute permitted the sentencing judge to consider mitigating evidence, but only if the evidence related to the specific subjects of the three statutory mitigating circum-

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[2] Moreover, the Court has rejected arguments that a state statute can be defective because it affords the jury *too much* latitude in determining what evidence should be considered mitigating and how much effect should be given to that evidence. In *Gregg v. Georgia*, 428 U.S. 153, 197 (1976), the Court rejected petitioner's argument that Georgia's then-new statute was unconstitutional for permitting "arbitrary grants of mercy" and because "the scope of the evidence and argument that can be considered at the presentence hearing is too wide." *Id.* at 200; *see also Zant v. Stephens*, 462 U.S. 862, 875, 879 (1983).

stances. *Id.* at 608. The plurality explained that the "limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments." *Id.*

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court again was confronted with sentencing processes that allowed consideration of some, but not all, of the mitigating evidence presented. The state trial court, affirmed by the state court of appeals, considered the petitioner's youth to be the only mitigating factor and refused to consider as potentially mitigating the evidence regarding petitioner's violent background, including his unhappy upbringing and emotional disturbance. *See id.* at 109-10, 113-14. This Court reversed, concluding that the evidence was mitigating and had been improperly excluded from consideration:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any mitigating evidence . . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-14.

In 1987, this Court made explicit the direct connection between full consideration of mitigating evidence and the constitutional mandate that jurors be allowed to express fully their reasoned moral response to such evidence. In *California v. Brown*, 479 U.S. 538 (1987), the Court considered whether the rule of *Lockett* and *Eddings* was infringed by an instruction that jurors not consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" during their penalty phase deliberations. *Id.* at 539. The Court decided that this cautionary instruction did

not preclude the jurors from properly evaluating the defendant's evidence. *Id.* at 541-42.

Justice O'Connor wrote separately and addressed what she perceived as the larger issue in the case, namely, the scope of the defendant's constitutional entitlement to consideration of his mitigating evidence, and how the challenged instruction might affect that right. *Brown*, 479 U.S. at 545-46 (O'Connor, J., concurring). Recognizing that criminal punishment jurisprudence in general had long focused on "culpability" in sentencing decisions, and that capital punishment systems in particular sought to ensure that any decision was "sensible to the uniqueness of the individual," Justice O'Connor stated that "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 545 (citation omitted). Accordingly, she reasoned, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *Id.* Incorporating the *Lockett* definition of relevant mitigating evidence, Justice O'Connor concluded that only such an open and individualized inquiry would result in a sentence that reflects "a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (emphasis in original).

That same term, this Court reconsidered the statute that it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), and determined that *in practice* the Florida scheme could deny the jury full authority to consider and give effect to mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence:

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton;

> that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Id. at 397. This Court observed that the Florida statute under which Hitchcock was sentenced confined consideration of "mitigating circumstances" to those enumerated in the statute. Because Hitchcock's mitigating evidence could not be fully considered within the enumerated mitigating circumstances, the Court unanimously concluded that the Florida procedure deprived Hitchcock of his right to an individualized determination of sentence. *Id.* at 399.

The Court noted that Hitchcock's trial counsel had urged the jury to focus on the "overall picture" of his client, in addition to considering those facts that supported the enumerated mitigating circumstances in the former Florida statute. *Hitchcock*, 481 U.S. at 397-98. Counsel also urged the sentencing judge (after the jury's adverse recommendation) to consider Hitchcock's troubled back-ground as he decided Hitchcock's punishment. *Id.* Consideration of such background evidence is essential to a reasoned moral response. Thus, although the vocabulary of *Hitchcock*'s Eighth Amendment analysis was not yet Justice O'Connor's, its result closely reflected the spirit of the concurrence in *Brown*.[3]

Similarly that term, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that even a very narrowly defined, highly aggravated category of murder—*i.e.*, murder com-

[3] *Hitchcock*, like the present cases, involved a reexamination—in light of *Lockett* and *Eddings*—of a statute previously found facially constitutional. Although in 1976 the statute approved in *Proffitt* had not "clearly operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the *Proffitt* scheme. *See Penry*, 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 607).

mitted by a prisoner already serving a sentence of life without parole—could not justify an automatic sentence of death. *Id.* at 81-82. As the Court reasoned,

> [t]hese two elements of capital murder[4] do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case . . . . Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant *deserves to be sentenced to death* for a later murder, but the inferences to be drawn concerning an inmate's character *and moral culpability* may vary depending on the nature of the past offense.

Id. at 78, 81 (emphases added). Here, for the first time, a majority of the Court identified the capital sentencing jury's task as "drawing inferences" about the defendant's "*moral* culpability," based on relevant mitigating evidence.

This sentencing process of coming to a decision that is both reasoned and moral begins with the defendant's right to *introduce* any and all relevant evidence touching on the character and background of the defendant and the circumstances of the offense. But it does not end there. A sentence of death may be imposed only after the sentencer is empowered to *consider and give full effect* to such evidence.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court again addressed the relationship between the requirement of unrestricted consideration of mitigating evidence and the need to base a defendant's sentence on a reasoned moral response to the defendant, his background and character, and his offense. A divided Court ruled in *Franklin* that a defendant's evidence of a clean prison disciplinary record

[4] The two elements were "that [the defendant] had been convicted of murder while in prison, [and] that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole." 483 U.S. at 78.

could adequately be considered under the Texas special issues scheme. Justice O'Connor (joined by Justice Blackmun) concurred only in the judgment, not in the plurality opinion. She concluded that, under the particular facts of the case, the Texas scheme fairly addressed the defendant's evidence because the full mitigating meaning of his clean prison record could be considered *within* the second special issue, *i.e.*, the issue relating to future dangerousness. At the same time, Justice O'Connor emphasized that the "principle underlying *Lockett, Eddings*, and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 184 (O'Connor, J., concurring in the judgment). She observed that, if the

> petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Id. at 185.

The three dissenting justices echoed Justice O'Connor's reasoning, stating that the jury must "not merely . . . be allowed to hear any such [mitigating] evidence the defendant desires to introduce, . . . [but it also must] be allowed to give 'independent mitigating weight' to the evidence." *See id.* at 191-92 (Stevens, J., dissenting) (internal citations omitted). Thus, five Justices in *Franklin* agreed that a sentencing scheme that does not permit the sentencer to consider and give full effect to mitigating evidence would run afoul of the Constitution.

Franklin showed that *Jurek v. Texas*, 428 U.S. 262 (1976), sustaining the facial validity of the former Texas statute, remained in effect: the former Texas special issue scheme

did not *invariably* prevent the sentencer from giving adequate consideration and effect to mitigating evidence. But *Franklin* also implied that in some cases the former scheme would not permit the sentencer to give adequate consideration and effect to a defendant's personal moral culpability, and that, in such circumstances, the scheme would not comport with the Eighth Amendment's guarantee of individualized sentencing.

One year later, in *Penry I*, the Court recognized precisely this point. *Penry I* confirmed that full sentencer consideration of mitigating evidence is the *sine qua non* of a reasoned moral response. The Court emphasized that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence." 492 U.S. at 319. The Court explained that "[r]ather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime." *Id.* at 328 (internal quotations omitted) (emphasis in original). To be constitutional, therefore, a death penalty sentencing structure must provide the jury "with a vehicle for expressing its 'reasoned moral response'" to the mitigating evidence. *Id.* The questions that the Texas jury answered in determining the defendant's sentence did not provide that requisite vehicle in *Penry I*, and, thus, the Court reversed in relevant part and remanded for resentencing. *Id.*

Nothwithstanding this Court's explanation of the direct link between consideration of mitigating evidence and the sentencer's ability to provide a reasoned moral response to the defendant and his offenses, the Texas trial and appellate courts "misapprehended" the decision in *Penry I*. This Court, therefore, was required in *Penry II* to explain further the requirement that the jury be allowed not only to consider, but also to give effect to, mitigating evidence. 532 U.S. at 797. The Court stressed that "*Penry I* did not hold that the mere

mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' the mitigating circumstances in deciding the appropriate sentence." *Id.* Instead, the Court stated, "the key under *Penry I* is that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" *Id.* (quoting *Penry I*, 492 U.S. at 319) (alterations in original). The requirement that the sentencer treat the defendant as a uniquely individual human being thus depends on the sentencer having a "'vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.'" *Id.* (quoting *Penry I*, 492 U.S. at 328).

II. THE COURT'S DECISIONS ON THE FORMER TEXAS CAPITAL SENTENCING SCHEME REQUIRE TEXAS SENTENCING JURIES TO BE ABLE TO CONSIDER, AND GIVE FULL EFFECT TO, MITIGATING EVIDENCE.

Since *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has had a number of opportunities to apply the foregoing principles to cases presenting constitutional challenges to the Texas capital sentencing statute that was in effect during Smith's and Tennard's trials. The Court considered a facial challenge to the former Texas capital sentencing statute—the same statute at issue in Smith's and Tennard's cases—in *Jurek v. Texas*. The plurality in *Jurek* concluded that the Texas statute is constitutional because of the narrowed definition of capital murder, combined with the jury's opportunity to consider whatever mitigating evidence the defendant presents:

> By *narrowing its definition of capital murder*, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By

> authorizing the defense to bring before the jury at the separate sentencing hearing *whatever mitigating circumstances relating to the individual defendant can be adduced*, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

428 U.S. at 276 (emphasis added). Thus, *Jurek* did not rest on the idea "that the Special Issues performed a narrowing function; rather [the Court's] concern . . . was whether the Special Issues interfered with the jury's full consideration of mitigating evidence." *See Franklin*, 487 U.S. at 196 (Stevens, J., dissenting).

Whereas *Jurek* posed only a facial challenge to the Texas death sentencing scheme, *Franklin v. Lynaugh* presented the first "as-applied" challenge to the Texas statute. *See Franklin*, 487 U.S. at 171; *Johnson v. Texas*, 509 U.S. 350, 383 (1993) (O'Connor, J., dissenting). In *Franklin*, four Justices concluded that the mitigating evidence of good behavior in prison was relevant only to the issue of future dangerousness. 487 U.S. at 177-79. Justices O'Connor and Blackmun concurred in the judgment because they agreed that, under the circumstances of that case, evidence of good behavior in prison "had no relevance to any other aspect of petitioner's character." *Id.* at 185 (O'Connor, J., concurring in the judgment). They disagreed, however, with the plurality on the issue of whether the state may limit the sentencer's ability to give effect to the mitigating evidence:

> [I]t is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would

> be meaningless unless the sentencer was also permitted to give effect to its consideration.

Id. at 184-85. And on this point, Justices Stevens, Brennan, and Marshall, in a dissenting opinion, agreed: "[N]othing in *Jurek* implies that the Special Issues could be used to curtail the defendant's right to have the sentencing decision made on the basis of all relevant mitigating evidence." *Id.* at 197-98 (Stevens, J., dissenting). Thus, a majority of the Justices in *Franklin* concluded that a State may not limit a sentencer's ability to give effect to mitigating evidence.[5]

Penry I demonstrates that the concurring and dissenting Justices in *Franklin* were correct that *Jurek* did not foreclose all as-applied challenges to the constitutionality of the Texas death sentencing scheme. Rather, the petitioner in *Penry I* simply asked that the State "fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." *See Penry I*, 492 U.S. at 315. As the Court had observed in *Jurek*, a unique aspect of the former Texas scheme is that it did not explicitly refer to, or provide for, the consideration of mitigating evidence. *Id.* at 316; *see also* 428 U.S. at 272. Instead, it relied entirely on the special issues.

Penry I held that Penry's mitigating evidence—evidence of mental retardation and childhood abuse—had relevance

[5] Five Justices in *Franklin* also agreed that evidence may be relevant to the sentencing determination of moral culpability but at the same time be beyond the scope of the special issues. *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring in the judgment); *id.* at 190-91 (Stevens, J., dissenting). The concurrence observed, for example, that "[e]vidence of voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty." *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring in the judgment); *see also id.* at 190 (Stevens, J., dissenting).

beyond the scope of any of the three special issues. Whatever bearing it may have had on those issues, it was additionally and constitutionally relevant because it also shed light on his moral culpability. *Penry I*, 492 U.S. at 322-25. The jury could have concluded that Penry acted deliberately, would be a future danger, and acted unreasonably in light of the lack of provocation by the decedent (*i.e.*, could have answered all of the special issues affirmatively), while also concluding that Penry was less morally culpable or blameworthy for his crime, and thus not deserving of a death sentence. *See id.* Yet the jury "was only able to express its views on appropriate sentence by answering [the] three questions." *Id.* at 320. Thus, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

The Texas legislature clearly understood after the Court's *Penry I* decision that moral culpability relates to something more than the criminal act. After this Court's decision in *Penry I*, the Texas capital sentencing statute was amended (effective September 1, 1991) to provide that an additional open-ended mitigating evidence question would be presented to the jury if the jury answered "yes" to the first two special issue questions:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Crim. Proc. Code Ann. art 37.071, § 2(b)(1), (2). Thus, the Texas legislature drafted a statute that, in keeping with this Court's decisions, requires what was missing in the pre-1991 Texas capital sentencing scheme under which Smith and

Tennard were sentenced to die—an opportunity to consider and give full effect to all mitigating evidence.

By enacting this change, the Texas legislature addressed the constitutional problems of the former statute. As Judge Higginbotham pointed out in his concurring opinion in *Robertson v. Cockrell*, "[i]t is no surprise that Texas wisely moved to the common sense solution of asking the jury an additional question: whether, considering all the mitigating evidence, death should be imposed." 325 F.3d 243, 258 (5th Cir.) (en banc) (Higginbotham, J., concurring), *cert. denied*, 124 S. Ct. 28 (2003). The Fifth Circuit's constricted application of *Penry I* and its insistence on the adequacy of the former special issues in any case but one that precisely mirrors *Penry*'s facts is inconsistent not only with the message sent by the Texas legislature more than a decade ago, but also with this Court's numerous decisions on the proper treatment and significance of mitigating evidence.

Since *Penry I*, the Court has entertained two other challenges to the application of the former Texas capital sentencing scheme in cases not involving John Penry. Both *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), presented the issue of whether the unadorned special issues adequately allowed jurors to consider mitigating evidence of youth.[6]

In *Graham*, the petitioner's conviction became final on September 10, 1984, several years before the Court's decision in *Penry I*. *See Graham*, 506 U.S. at 468. The case presented a collateral attack on the sentence, and thus the Court was obliged under *Teague v. Lane*, 489 U.S. 288 (1989), to "'determine, as a threshold matter, whether granting [Graham] the relief he seeks would create a new rule' of

[6] The two cases came to the Court in different procedural postures. *Graham* involved a petition for a writ of habeas corpus. *See Graham*, 506 U.S. at 466-67. *Johnson* came before the Court on direct review. *See Johnson*, 509 U.S. at 352.

constitutional law." *Graham*, 506 U.S. at 466-67 (quoting *Penry I*, 492 U.S. at 313). The Court concluded that Graham was seeking a new rule. *See id.* at 468. Thus, instead of reaching the merits of Graham's claims, the Court considered only the different question of whether "reasonable jurists hearing [Graham's] claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor." *Id.* at 467 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *see also Johnson*, 509 U.S. at 378 (Souter, J., dissenting). The Court answered that inquiry in the negative, and therefore ruled that it was barred from granting relief. *Graham*, 506 U.S. at 467.

In *Johnson*, there was no "*Teague*" problem because the case came to the Court on direct review. *See Johnson*, 509 U.S. at 366. Although *Graham* was decided on the narrow procedural ground just described, the majority in *Johnson* nonetheless relied considerably on *Graham* in rejecting Johnson's constitutional claim that the sentencing jury was deprived of the opportunity adequately to consider and give effect to his mitigating evidence of youth. *See id.* at 365-67; *see also id.* at 378 (Souter, J., dissenting). The majority concluded that Johnson's mitigating evidence of youth could be considered fully under the "future dangerousness" special issue. *Id.* at 369-72. The Court stated that "[i]t is both logical and fair for the jury to make *its determination of a defendant's future dangerousness* by asking the extent to which youth influenced the defendant's conduct." *Id.* at 369 (emphasis added). The Court further explained that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* at 370.

Johnson thus stands for the limited proposition that in the circumstances of that case the single item of mitigating evidence at issue—petitioner's youth—could be adequately

addressed under the second special issue. It established no more general rule, as the subsequent decision in *Penry II* demonstrates.[7]

In *Penry II*, the Court reviewed the trial court's supplemental instruction, which was developed in response to *Penry I*, and concluded that it failed to address the problem that the Court had identified in *Penry I*—namely that "none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse." *See Penry II*, 532 U.S. at 791, 798. The supplemental instruction was nothing more than a hollow, cosmetic change: "Because the supplemental instruction had no practical effect, the jury instructions at Penry's second sentencing were not meaningfully different from the ones that we found constitutionally inadequate." *Id.* at 798. The jury still had no vehicle for expressing the view that Penry's mitigating evidence warranted life imprisonment rather than a death sentence.[8]

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[7] Any broader reading of *Johnson* would run counter to the Court's earlier decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the Court declared that "States *cannot limit* the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty. In this respect, the State *cannot channel* the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.* at 306 (emphasis added). Thus, although the States must "establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for the death penalty, the same is not true of mitigating evidence. *McCleskey*, 481 U.S. at 305; *see also Penry I*, 492 U.S. at 326-27 (contrasting the constitutional need to narrow the class of murders eligible for the death penalty with the constitutional need to allow full consideration of mitigating evidence).

[8] *Williams v. Taylor*, 529 U.S. 362, 398 (2000), a case involving a death sentence imposed by a Virginia jury, demonstrates that some evidence that is relevant to the jury's sentencing determination is not

III. THIS COURT'S DECISIONS LEND NO SUPPORT TO THE ARTIFICIAL STANDARD THAT THE FIFTH CIRCUIT HAS DEVELOPED FOR DETERMINING WHETHER THE FORMER TEXAS SENTENCING SCHEME IMPERMISSIBLY RESTRICTED THE JURY'S ABILITY TO CONSIDER AND GIVE FULL EFFECT TO A DEFENDANT'S MITIGATING EVIDENCE IN A PARTICULAR CASE.

Both Tennard and Smith asked the Fifth Circuit to consider whether the pre-amendment Texas special issues provided the jury with a vehicle to give full effect to the mitigating evidence that each defendant presented during the sentencing phase of his trial. *See Smith v. Cockrell*, 311 F.3d 661, 677-79 (5th Cir. 2002); *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002). In both cases, the court of appeals converted this inquiry into the question whether "the mitigating evidence introduced at trial was *constitutionally* relevant and beyond the effective reach of the jury." *Tennard*, 284 F.3d at 595 (emphasis added); *see also Smith*, 311 F.3d at 679-80. Since its decision in *Graham v. Collins*, 950 F.2d 1009, 1029-30 (5th Cir. 1992), *aff'd*, 507 U.S. 968 (1993), the Fifth Circuit has sought to limit the kinds of evidence to which this Court's decision in *Penry I* can apply. The court has used two phrases, "constitutionally relevant mitigating evidence" and "*Penry I* evidence," as labels for the increasingly narrow category of evidence that, in the lower court's view, warrants scrutiny under *Penry I*.

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encompassed completely by the concept of "future dangerousness." In *Williams*, the Court held that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* Thus, the Court acknowledged that all of the petitioner's mitigating evidence was relevant and should have been introduced, for reasons apart from the issue of the defendant's future dangerousness.

According to the Fifth Circuit, the only mitigating evidence that is "constitutionally relevant" is evidence that shows "'(1) a uniquely severe permanent handicap [] with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this severe permanent condition.'" *Smith*, 311 F.3d at 680 (quoting *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir.), *cert. denied*, 516 U.S. 992 (1995) (internal quotation marks and citations omitted)); *Tennard*, 284 F.2d at 595 (same). As to the first of these two requirements, the Fifth Circuit has stated explicitly that the mitigating evidence must relate "either to severe mental retardation or extreme child abuse." *Smith*, 311 F.3d at 680. The second of these requirements is "essentially . . . a 'nexus' requirement," requiring a connection between the offense and the condition to which the mitigating evidence refers. *Smith*, 311 F.3d at 680-81; *Tennard*, 284 F.3d at 597.[9]

By requiring that mitigating evidence satisfy a threshold series of requirements before any inquiry into the adequacy of the former Texas sentencing scheme is even raised, the court of appeals has artificially narrowed this Court's decisions. Moreover, the court of appeals has circumvented the fundamental inquiry that this Court requires: whether the former Texas special issues in practice precluded the sentencer from considering and giving full effect to relevant mitigating evidence during the sentencing determination. *See Lockett*, 438 U.S. at 604 (plurality opinion); *Eddings*, 455 U.S. at 113-14; *Franklin*, 487 U.S. at 183; *see also Robertson*, 325 F.3d at 279 (Dennis, J., dissenting) ("Where our en banc decision in *Graham* and its progeny go wrong is by failing to ask the fundamental *Penry I* question of how, if

[9] As far as we are aware, the "uniquely severe permanent condition" requirement and the "nexus" requirement are peculiar to the Texas capital system and have not been applied in any other State or any other death penalty sentencing scheme.

at all, the Texas special issues allow a jury to give meaningful consideration to a particular piece of mitigating evidence.").

Nothing in either *Penry I* or the Court's other decisions supports the Fifth Circuit's decree that "*Penry I* evidence" must involve (1) either severe mental retardation or extreme child abuse and (2) a nexus to the crime. The Court's rationale for *Penry I* (and *Penry II*, for that matter) proceeds from the premise that the sentencing authority must be permitted to consider and give full effect to whatever mitigating evidence a capital defendant may present. If such evidence does not bear on future dangerousness but is mitigating in other ways, or if it does bear on future dangerousness but is potentially mitigating for other reasons as well, the "future dangerousness" special issue alone will not enable the sentencer to give full effect to the defendant's mitigating evidence. By definition, in such circumstances, the second special issue will channel the jury's consideration in a way that does not encompass the full mitigating force of the defendant's evidence. That is equally true whether the evidence is just like that presented by Penry or whether it falls in one of the numerous other categories that the court of appeals has held cannot qualify as "*Penry I* evidence." *See Smith*, 311 F.3d at 680 n.15 (listing cases presenting, *inter alia*, mitigating evidence of psychotic disorders and mental illness, diminished capacity and low intelligence, remorse, acceptance of responsibility and cooperation with the authorities, religious devotion, good character, troubled childhood, intoxication and substance abuse, efforts at betterment in prison, military service, and secondary role in the crime).

Indeed, in the dozens of cases in which the Fifth Circuit has applied its requirements for identifying "*Penry I* evidence," the court almost invariably has ruled that those requirements were not satisfied. We are aware of only one case in which the court of appeals has reached a different conclusion. *See Blue v. Cockrell*, 298 F.3d 318 (5th Cir.

2002). In *Blue*, the record evidence, presented through expert testimony, established Blue's complex treble disabilities of mental retardation, mental illness, and severe psychological disorder—the combination of which made it "almost inevitable that [Blue] would be in conflict with the law." *Id.* at 321. Thus, the only time the court of appeals has been prepared to conclude that its requirements for "*Penry I* evidence" were met, the evidentiary record was nearly strong enough to enable the defendant to present an actual defense to the charges on which he was convicted.

The court of appeals attempts to justify its nexus requirement by claiming that it "echoes the language of *Penry I*, where the Supreme Court found that Penry's mitigating evidence demonstrated that his criminal acts were 'attributable to' his disadvantaged background and mental problems." *Smith*, 311 F.3d at 680-81 (quoting *Penry I*, 492 U.S. at 304).[10] But this seeks to read into *Penry I* a restriction that is not there. To be sure, *Penry I* alluded to the "'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). This language did not purport to create different categories of mitigating evidence, some of which would raise *Penry* concerns and others of which would not. The Court's remarks was descriptive, not restrictive. Taking this sentence entirely out of context, the Fifth Circuit has used it as a basis for engrafting its nexus requirement onto the *Penry I* decision. This is at odds with the guiding principle in death penalty cases that the sentencer must be allowed to consider and give full effect to all mitigating evidence.

[10] The *Penry I* page cited by the Fifth Circuit is actually the syllabus, not the Court's opinion.

The Fifth Circuit's narrow conception of "constitutionally relevant mitigating evidence" contradicts a long line of this Court's decisions about what is relevant mitigating evidence. In *Lockett v. Ohio*, the plurality recognized that relevant mitigating evidence includes "any aspect of the defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death." *See Lockett*, 438 U.S. at 604 (plurality opinion). In *Hitchcock*, the petitioner presented evidence about his childhood habit of inhaling gasoline fumes, the poverty of his family, his father's death of cancer, and his active role as an uncle to the children of one of his brothers. 481 U.S. at 397. The Court ruled that the petitioner's difficult upbringing and his potential for rehabilitation were relevant to the sentencing determination and that the advisory jury had to be allowed to consider those circumstances. *Id.* at 399. None of that evidence involved a handicap, much less a severe and permanent one, and none of that evidence therefore would qualify as "constitutionally relevant," in the Fifth Circuit's lexicon. *See also Eddings v. Oklahoma*, 455 U.S. at 109-10 (constitutional requirement to consider evidence of defendant's unhappy upbringing and emotional problems, neither of which would qualify as "*Penry I* evidence" in the Fifth Circuit); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (constitutional requirement to consider good prison behavior, even though it plainly does not involve a uniquely severe permanent handicap, and even though it plainly was not the cause of petitioner's offense).[11]

[11] *See also Johnson*, 509 U.S. at 381 (O'Connor, J., dissenting) (stating that in *Skipper*, "we reiterated that evidence, even if not 'related specifically to petitioner's culpability for the crime he committed,' must be treated as relevant mitigating evidence if it serves 'as a basis for a sentence less than death'" (quoting *Skipper*, 476 U.S. at 5) (internal citations and quotation marks omitted)); *Eddings*, 455 U.S. at 113-14 (reversing sentence because lower courts, in violation of *Lockett*,

The Fifth Circuit's standard for what constitutes relevant mitigating evidence runs counter to *Eddings* for yet another reason. In *Eddings*, the Court held that the sentencer is entitled to determine the weight to be given to mitigating evidence in deciding whether a defendant should be sentenced to death. *See* 455 U.S. at 113-14 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."). But if the Fifth Circuit's standard of relevance were taken to its logical conclusion, a trial court could determine that because the evidence is not constitutionally relevant, it should not even be introduced to the jury. Such a result clearly would be inconsistent with this Court's decisions and demonstrates that the Fifth Circuit's "constitutionally relevant" mitigating evidence limitation is flawed. As Judge Stewart wrote in the court of appeals, "the type of mitigating evidence is inapposite to the analysis. The mere fact that there is mitigating evidence is what prevails." *See Robertson*, 325 F.3d at 273 (Stewart, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)).[12]

Finally, it is worth noting that the "future dangerousness" special issue, as applied, has proved especially hospitable to all manner of evidence that Texas has sought to introduce in an effort to persuade juries to impose the death penalty, whereas it is, for the reason described above, an ill-fitting

apparently had "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability").

[12] "It is not for [the Fifth Circuit] to stand in the shoes of the jury in the sentencing phase of a capital trial and determine the quality and quantity of the mitigation evidence placed before them." *Robertson*, 325 F.3d at 271 (Stewart, J., dissenting); *see id.* at 272 ("It is not up to the [Fifth Circuit] to determine the strength of the mitigating evidence, the [Fifth Circuit's] only responsibility is to ensure that the instructions did not prevent the jury from considering the evidence.").

vehicle for juries to use in providing a "reasoned moral response" to mitigating evidence presented by defendants. Texas courts have ruled, for example, that a jury's affirmative answer to the "future dangerousness" question can properly be based, at least in part, on evidence that a defendant had previously "unlawfully shot a cow" or "wantonly shot and killed a buffalo," *Farris v. State*, 819 S.W.2d 490, 497-98 (Tex. Crim. App. 1990); that the defendant was truant, smoked cigarettes, and disrupted classes in high school, *Kunkle v. State*, 771 S.W.2d 435, 446 (Tex. Crim. App. 1986); and that the defendant had a "bad reputation" in several communities, *Willis v. State*, 785 S.W.2d 378, 387 (Tex. Crim. App. 1989).[13] In none of these cases was Texas obliged to demonstrate any "nexus" between the State's evidence and the underlying offense. If the Fifth Circuit's conception of "constitutionally relevant" mitigating evidence were permitted to stand, then surely comparable limitations would need to be imposed on the kinds of evidence on which the State properly could rely to support imposition of a capital sentence.

[13] The Texas Court of Criminal Appeals has stopped short of attributing aggravating effect to evidence that the defendant previously had participated in football and hunting. The court rejected the State's argument "that participation in these so called 'violent sports' demonstrate[s] future dangerousness." *Ellason v. State*, 815 S.W.2d 656, 663 (Tex. Crim. App. 1990).

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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